(1)

No. 96-6298-CFH Title: Aaron Lindh, Petitioner
v.
James P. Murphy, Warden

Docketed: October 10, 1996 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Oct 10 1996	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 9, 1996)
	Oct 10 1996	Motion of petitioner to have petition for a writ of certiorari considered with other pending cases filed.
	Oct 17 1996	Waiver of right of respondent James P. Murphy, Warden to respond filed.
	Oct 24 1996	DISTRIBUTED. November 8, 1996
	Nov 4 1996	Response requested.
	Dec 4 1996	Brief of respondent James P. Murphy, Warden in opposition filed.
	Dec 19 1996	REDISTRIBUTED. January 10, 1997
	Jan 6 1997	REDISTRIBUTED. January 10, 1997
	Jan 10 1997	Petition GRANTED. Limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT April 14, 1997. **********
	Feb 18 1997	Record filed.
	Feb 21 1997	Brief of petitioner Aaron Lindh filed.
	Feb 21 1997	Brief amicus curiae of National Assocition of Criminal Defense Lawyers filed.
	Feb 21 1997	Joint appendix filed.
	Feb 26 1997	Record filed.
	Feb 28 1997	CIRCULATED.
	Mar 20 1997	Brief of respondent James P. Murphy, Warden filed.
	Mar 20 1997	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Mar 21 1997	Brief amici curiae of Ohio, et al. filed.
	Mar 21 1997	Brief amicus curiae of Washington Legal Foundation filed.
	Apr 2 1997	Reply brief of petitioner Aaron Lindh filed.
	Apr 14 1997	ARGUED.

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No. 96-6298

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATE COURTS OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") on April 24, 1996. The Act's habeas corpus title, inter alia, amends 28 U.S.C. §2254 (d). This petition presents the following questions concerning the Act and amended §2254 (d):

I.

Whether the court of appeals correctly concluded that Congress, despite an explicit provision in §107(c) of the Act, failed to specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases; and, if so, whether the court correctly interpreted this Court's retroactivity jurisprudence to depend upon proof of actual reliance interests and to create a presumption that habeas-curtailing statutes apply retroactively?

II.

Whether the court of appeals correctly concluded that §2254(d)'s provision for habeas corpus relief when a state court "decision was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States" forbids relief when the state decision erroneously applied the Constitution to the facts of a particular case as a matter of this Court's clearly established law; and, if so, whether that result violates Article III or the Suspension Clause of the Constitution?

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURTS OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Aaron Lindh respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals affirming the denial of habeas corpus relief.

OPINIONS BELOW

The opinion of the court of appeals, Lindh v. Murphy, 1996 WL 517290 (7th Cir. Sept. 12, 1996) (en banc), is in Appendix A. The unpublished opinion of the district court is in Appendix B. In Appendix C is the Wisconsin Supreme Court opinion, State v. Lindh, 468 N.W.2d 168 (Wis. 1991), reversing the Wisconsin Court of Appeals' grant of a new trial (State v. Lindh, 457 N.W.2d 564 (Wis. App. 1990), Appendix D) and affirming Mr. Lindh's conviction and consecutive life terms plus 35 years.

JURISDICTION

The court of appeals entered judgment on September 12, 1996. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). As he did below, Mr. Lindh asserts the deprivation of rights secured by the United States Constitution and 28 U.S.C. §§2241-2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const. Art. I, §9, ¶2; Art. III; Art. VI, ¶2; Amend. VI, XIV. It also involves 28 U.S.C. §§2241-2266. These provisions are reproduced in Appendix E.

STATEMENT OF THE CASE

A. Statement of Facts

At noon on January 15, 1988, Petitioner Aaron Lindh left a meeting with City Police Department officials in the City-County Building in Madison, Wisconsin and went to his car. Upset at the City Police Department's failure to solve two burglaries at his apartment, Lindh took a .22 caliber rifle from his car, went back into the Building to the offices of the Dane County Sheriff's Department (with which he had no quarrel) and began shooting people he had never met. A sheriff's secretary and the county medical examiner died; a private citizen was wounded. Lindh then pointed his rifle at an armed deputy sheriff and advanced, shouting "Shoot me! Kill me!" The deputy shot him. C-3, C-4, D-2.[1] Lindh had a history of psychiatric problems. R:2:Tab-B:17.

While Lindh was undergoing surgery, the District Attorney ("D.A.") retained Dr. Leigh Roberts, a forensic psychiatrist, to help the state meet an insanity defense. That evening, Dr. Roberts interviewed Lindh in the intensive care unit. Subsequently, Roberts was to interview Lindh again and file a report with the prosecutor—on August 17, 1988—concluding that Lindh had no mental disease at the time of the shootings. Roberts repeated his August 17 conclusions at trial, where Lindh's sanity was the only contested issue. Roberts' testimony was the mainstay of the state's case. A second psychiatrist appointed by the court and a third retained by the defense testified that Lindh was suffering from a mental disorder when his dispute with the City Police Department turned into a shooting spree at the County Sheriff's Department. C-7, C-8, D-3 to D-5.

[1]Opinions in the appendices to this Petition are cited by appendix and page number. The trial transcript is not in the federal habeas record. Although Mr. Lindh is indigent, the state refused to furnish it (cf. Rule 5 of the Rules Governing §2254 Cases); the district court denied Lindh's motion to compel production (B-2); and the court of appeals denied Lindh's motion to supplement the record with relevant transcript excerpts (A-8, A-19). The direct appeal briefs are in the record and are cited as "R:2:Tab __." The Appendix to Lindh's Supplemental Brief below is cited as "SA"; his Supplemental Reply Brief below is cited as "LRB."

Six weeks after the state retained Dr. Roberts on Lindh's case, the psychiatrist learned that a patient had charged him with having sexual relations with her during treatment sessions. This conduct, Roberts knew, was a felony under state law. Two months later Roberts learned that the State Medical Examining Board was investigating allegations that he had sexually exploited three patients. A month later—the day after Roberts interviewed Lindh a second time at the prosecutor's request—University of Wisconsin Hospital officials informed the D.A. that their investigation of the patients' allegations had led them to suspend Roberts' hospital privileges and refer the matter to the D.A. for investigation of felony charges. D-4.[2]

Noting that a "conflict of interest" would arise if the D.A. kept Roberts employed on Lindh's case while simultaneously investigating him, the D.A. elected to continue employing Roberts and refer the allegations against him to a prosecutor in another county. About a month after the D.A. told Roberts of the Hospital's charges and the D.A.'s referral of them, Roberts filed his report with the D.A. finding Lindh free of mental disease. C-5, R:2:Tab B:App.113.

Just before trial, the Medical Examining Board publicly moved to suspend Dr. Roberts' license because he had sexually exploited three patients. After learning of the Board's actions, defense counsel requested potential impeaching information about Roberts, and the D.A. revealed the Hospital's allegations and the D.A.'s consignment of them to another prosecutor's office. R:2:Tab B:12-13 & App. 103-14.

The D.A. then filed a motion in limine to forbid cross-examination of Dr. Roberts concerning "any possible ramifications of the [criminal] allegations" against him including his suspension by the University of Wisconsin Hospital. The trial court based its "blanket granting of the motion in limine" on the D.A.'s decision not to investigate Roberts but to refer the matter elsewhere.[3] D-4, R:2:Tab B:13-16 & App.11.

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[2]The Wisconsin Supreme Court wrote that the record does not show Roberts' hospital suspension. C-6. The record shows that defense counsel, the D.A. and the trial judge all believed that, if cross-examination were allowed, Roberts would testify that the Hospital had suspended him. R:2:Tab B:14-16; A-19.

[3]Three months after Lindh's trial, Roberts pled guilty to one count of sexual exploitation. On the prosecutor's recommendation, the judge spared Roberts any jail time or fine, citing his work on behalf of prosecuting authorities "throughout the State of Wisconsin as a forensic psychologist." A-18, A-26.

Wisconsin bifurcates the trial when the defendant pleads "not guilty by reason of mental disease." At the first phase, the jury decides whether the state has proved the elements of the offense beyond a reasonable doubt. At the second phase, the jury decides whether the defendant has proved that he had a mental disease when he committed the offense. If the defendant meets his burden, the jury enters a verdict of "not guilty by reason of mental disease." If not, it enters a verdict of "guilty." Wis. Stat. §971.165.

Following a jury finding that Lindh committed two counts of first-degree murder and one of attempted first-degree murder, Dr. Roberts was called as the state's "principal witness" at the second phase. D-5. To accredit his opinion that Lindh had no mental disease, Roberts testified to his employment by the University of Wisconsin Medical School, work "in relation to religion and mental health" including as a teacher at a theological seminary, receipt of an award "as essentially the mid-west psychiatrist of the year," and a loving relationship with eight grandchildren "up to nearly the age of Mr. Lindh." Id. Accepting Roberts' view that Lindh was not suffering from a mental disease, the jury found him guilty. "Accordingly, a judgment of conviction was entered against Lindh on all charges." C-3.

A verdict of "not guilty by reason of mental disease" would have required Lindh to be confined in a state mental facility for a minimum of six months. At that time and at six-month intervals thereafter, a state court would have had to entertain Lindh's petition for release and "grant the petition unless [the court] finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others ...." Wis. Stat. §971.17(4). In fact, the judge sentenced Lindh to two consecutive life sentences plus 35 years. A-1. He must serve a minimum of 35 years, 7 months and 23 days before becoming eligible for parole. Wis. Stat. §§302.11(1), 304.06(b) (1988).

The Wisconsin Court of Appeals reversed Lindh's convictions. The court concluded that "the jury could have reasonably inferred that a witness in the position of Dr. Roberts," under criminal investigation by a "state authority," would "perceive that he would benefit if he testified against Lindh or that he would suffer retaliation if he testified in favor of Lindh." D-7. "The error prejudiced Lindh," because Roberts was

the only one of the three testifying experts who asserted that Lindh had no mental disorder. Id.

A divided Wisconsin Supreme Court reversed. Without objection from the state, the court applied the Confrontation Clause to the sanity phase but concluded that the Clause left the trial court wide "discretion" over cross-examination and that this discretion was not abused by barring cross-examination about the criminal allegations against Dr. Roberts and the D.A.'s handling of them. C-8 — C-9. Because these circumstances did not involve "a prototypical form of bias"—Roberts was not testifying for and vulnerable to "the same ... prosecuting attorney" or prosecutors "in the same jurisdiction," and "[c]riminal process of some sort against the witness, even if only at its initial stages," was not "a reality"—cross-examination was not constitutionally required. C-12.

Lindh did not seek certiorari or state postconviction relief. Instead, on July 9, 1992, he filed a federal habeas petition presenting the confrontation claim. R:1. The state answered that a violation did not occur or did not affect the trial as a whole. It declined to file the trial transcript. R:2; supra note 1. Mr. Lindh moved to compel production of the transcript and set a briefing schedule. R:5. The state asked the court to defer ordering a transcript and accept briefs on an argument not raised in the Wisconsin courts: that the Confrontation Clause does not apply at the sanity phase. R:5. On September 22, 1992, Lindh replied asking the court to order the transcript or to take briefs on the state's new argument. R:6.

For the next 18 months, nothing happened, aside from Mr. Lindh's filing three letters requesting prompt action. SA 157-61, 167-71. Two days after Lindh's third letter, on March 4, 1994, the district court ordered briefs on the Sixth Amendment's application to the sanity phase. Briefs were timely filed by early May. R:9-13.

For the next 17 months, nothing happened, aside from further correspondence from Mr. Lindh seeking a prompt ruling. SA 172. On October 4, 1995, the District Court denied the petition, declining to order a transcript or to address the issue the parties had briefed and concluding that the Sixth Amendment permitted denial of cross-examination into whether past or hoped-for prosecutorial favors

relating to the criminal allegations against Dr. Roberts had biased his testimony. B-1.

Mr. Lindh appealed, arguing his case to a panel on April 9, 1996. The Antiterrorism and Effective Death Penalty Act ("the Act") became law two weeks later. On May 1, 1996, the court of appeals sua sponte announced that it would hear the case en banc prior to a panel decision and directed the parties to file briefs on the Act's amended §2254(d). By a vote of 8 to 3, the Court held that §2254(d) barred relief.

B. The Decision Below

The court of appeals first addressed Mr. Lindh's argument that amended §2254(d) does not apply to his long-pending petition because §107(c) of the Act expressly designates the class of "cases pending on ... the date of enactment of this Act" to which its habeas amendments do apply—specifically, capital cases in "opt-in" jurisdictions (see infra p.13)—and Mr. Lindh's case is not within that category. The court ruled that §107(c) creates "at most a negative implication" of congressional intent. It declined to draw that implication rather than the possible "competing inference ... that Congress could not agree on an effective-date provision for the amendments [which include §2254(d)]" or "overlooked" the matter. A-3.

The court then held that applying §2254(d) to Lindh's case would not have a "retroactive" effect within Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994). After citing several reasons why the application of §2254(d) to pending cases could be held to fall outside the "definition of retroactivity," the court confronted Landgraf's presumption against applying a statute when it "attaches new legal consequences to events completed before its enactment." Id. at 1499. Taking issue with the two other circuits that had addressed the matter, the court held that any effects of amended §2254(d) that would "reduce [Lindh's] chance of prevailing" from what it was when he filed his petition "will not do" as a new consequence under Landgraf. A-7, A-4. The only completed events to which new consequences can attach so as to bring the Landgraf presumption into play are particular actions that Lindh can prove he took in "reliance on the prior state of the law." A-7. Apprehension of a lowered chance of prevailing in federal habeas proceedings would not have affected Lindh's decision to forgo state postconviction proceedings

or certiorari because (1) Wisconsin law requires an "unusual reason" for a collateral attack, which Lindh did not identify; and (2) Lindh's case does not present "an abstract legal question" but a claim that the state courts misapplied settled law to the facts, so he "had no prospect in 1991 of receiving an audience in the Supreme Court" and "gave up nothing" by not seeking certiorari. A-7, A-8. In response to the argument that this Court exercises its certiorari power with advertence to the availability vel non of habeas review, LRB 12-13, the court limited Lindh to his own behavior; he "cannot successfully argue that the change of law [would have] affected the judicial process." A-5.

The court next construed the central provision of amended §2254(d) that bars relief on constitutional claims adjudicated in state court unless the state "decision ... was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." A-6. Conceding that "Congress lacks power to ... require federal judges to 'defer' to the interpretations reached by state courts," the court asked whether §2254(d) "tell[s] us to 'defer' to state decisions." A-13, A-9. Because "the word 'deference' does not appear in the statute"—and because federal deference to state "jurisdictions bound by [the Supremacy Clause] is not sensible"—the court held that the statute does not require deference. A-9. "The first phrase of §2254(d)(1)—authorizing a federal court to issue the writ when the state court's decision is 'contrary to ... clearly established Federal law, as determined by the Supreme Court ...' preserves ... federal courts' independent interpretive power." Id. "We must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States." A-11.

The court did not, however, "read the 'contrary to ...' language to authorize issuance of a writ whenever a [state] court errs." Id. "[W]hen the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts—when it is, in the standard phrase, a 'mixed question of law and fact'—§2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects 'an unreasonable application' of the law." Id. The court consigned "mixed questions" to the "unreasonable

application" phrase to keep it from being "vitiate[d]" by the "decision contrary to law" phrase. Id. Because mixed questions are ones "of degree," "painted in shades of grey, rather than in contrasting colors, a responsible thoughtful answer reached after a full opportunity to litigate is adequate ...." A-12.

The court summed up the "line" separating review under §2254(d)'s "decision contrary to law" phrase and its "unreasonable application" phrase as "[d]e novo ... review for core legal issues such as whether the Confrontation Clause applies, and deferential review for operational decisions within areas in which the constitutional norm allows discretion." A-18.

Under this reading of amended §2254(d), the court gave two reasons for denying Lindh relief:

1. The court found that there is no "clearly established" Supreme Court law requiring confrontation at proceedings like Wisconsin's sanity phase. The court located this issue between precedents denying confrontation at sentencing and Specht v. Patterson, 386 U.S. 605 (1967), which required confrontation at a hearing to determine whether a defendant convicted of indecent liberties would be sentenced to a term of 0 to 10 years, or to an indeterminate term of one day to life upon a finding that the defendant "is an habitual offender and mentally ill." A-15. Because Specht's second phase could "increase[] the maximum punishment" while Lindh's second phase could only decrease the minimum period of his incarceration, the court found that Specht was not dispositive. Id. Three judges dissented. A-20.

2. Even if the Clause does apply, the court held, the Wisconsin Supreme Court decision was not "contrary to ... clearly established Federal law" because the "opinion ... correctly states the holdings" of this Court's confrontation decisions. A-18; see id. (state court "asked the legally correct question"). And the state court's application of those decisions to the facts was not "unreasonable" because, as the majority read those decisions, if the trial judge permitted cross-examination of any sort to show that Roberts might not be telling the truth, the judge had discretion to completely bar cross-examination into particular motives to lie. A-18. This being only a question of "degree," the state court's "fact-specific answer cannot be called 'unreasonable' even if it is wrong (as some members of this court who join this opinion

believe)." A-18. Three judges dissented. See A-24.

The court gave two reasons why Article III allows Congress to confer jurisdiction on a federal judge to review a state decision for consistency with the Constitution but order the judge to leave the decision in effect even though it is "wrong" as a matter of law. A-18.

1. The court's first reason simultaneously explains why Congress may not "require federal judges to 'defer' to the interpretations reached by state courts" (A-13) but may require "deferential review for operational decisions" such as whether denying cross-examination into a motive to lie violates the Constitution. A-18. Because applying legal rules to facts is not interpretive activity, it demands no judicial independence and permits deference: When a dispute is about the Constitution's "application to a particular set of facts—when it is, in the standard phrase, a 'mixed question of law and fact'"—the "dispute lies not in the meaning of the Constitution." A-11 (emphasis added).

2. There is a "distinction between rights and remedies." A-13. "Regulating relief is a far cry from limiting the interpretive power of the courts." Id. So, as long as a federal court remains free to state that it disagrees with the state court's conclusion about a federal "right," Congress may compel the federal court to leave the state court's judgment in force as "an operational decision"—a mere wrong without a "remedy." Id.[4] Two judges dissented. A-26.

REASONS THE COURT SHOULD GRANT A WRIT OF CERTIORARI

A key provision of amended §2254(d) permits habeas corpus relief from unconstitutional confinement if the state court "decision [supporting the confinement] was contrary to ... clearly established Federal law as determined by the Supreme Court." The court below construed this provisions as forbidding relief when a state decision applying the Constitution to the facts is "wrong" under the Court's clearly established legal standards, unless the error was so gross as to be "unreasonable." The court held that Article

[4]As long as "Federal courts are free to express an independent opinion on all legal issues in the case," the "'judicial Power of the United States' (Art. III §1) [which] is the power to interpret the law independently" is maintained. A-10, A-12.

III lets Congress empower federal judges to review state court decisions for consistency with the Constitution but require them to leave such a decision in force and effect although it comes to a result that is at odds with the supreme law of the land. The unheard-of, novel consequences of these rulings were applied retroactively to Lindh's four-year-old petition despite manifest congressional intention not to affect previously filed cases of Lindh's type and despite the Landgraf presumption against retroactivity, which the court below converted into a rule about reliance.

The conclusions announced below conflict with all other circuit decisions on point, and with venerable notions about the prospectivity of law, the meaning of "law," and the function of Article III judges and the writ in maintaining the supremacy of national law. To see why, it is useful to examine the combined effect of the lower court's conclusions on a typical habeas case.

Consider a prisoner convicted on a confession that the state courts held voluntary under the established rule of Brown v. Mississippi, 297 U.S. 278 (1936). Before the 1996 amendment of §2254(d), a federal habeas court treated a petition raising an involuntariness claim as "a new suit brought ... to enforce a civil right." Ex parte Tom Tong, 108 U.S. 556, 560 (1883). The court adjudicated the claim entirely de novo, paying the state supreme court's decision no more heed than other relevant authority—i.e., treating it as nothing more than "the conclusion of a court of last resort of another jurisdiction." Brown v. Allen, 344 U.S. 443, 458 (1953).

Such a claim was governed by "the longstanding position that the ultimate question of the admissibility of a confession ... [is] a legal inquiry requiring plenary federal review." Miller v. Fenton, 474 U.S. 104, 115 (1985). Even if the state opinion correctly stated the rule of Brown v. Mississippi and its progeny, the federal court was obliged to grant relief if the decision applying that rule and admitting the confession was wrong. Teague v. Lane, 489 U.S. 288 (1989), did not alter this responsibility when it barred the creation of new legal rules on habeas. For "the rule in question is one which of necessity requires a case-by-case examination of the evidence, ... a rule designed for the specific purpose of evaluat-

ing a myriad of factual contexts," which "can tolerate a number of specific applications without saying that those applications themselves create a new rule." Wright v. West, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment).

In short, then, if a prisoner's conviction rested on a confession that the state courts had held voluntary by applying the governing legal standard to the totality of circumstances, but that a federal court would find was involuntary under the same standard and circumstances, the prisoner's filing of a habeas petition triggered an unconditional right to release or retrial. This remedy was qualitatively superior, in virtually every case, to other state and federal remedies, given its "as of right" character, immunization from res judicata defenses, and availability without further development of the record.

Indisputably, amended §2254(d) changes things in the cases to which it applies. The crucial questions are what and how much it changes, and to what cases it does apply. By its terms, amended §2254(d) follows Teague's lead in limiting federal habeas review to rules of law that are not new—i.e., to rules that were "clearly established" at the time of direct review. Extending Teague, the amendatory language of §2254(d)

- requires federal courts to treat the state decision as more than relevant authority—as the focus of review, and, barring a statutorily specified error, the law of the case;
- unqualifiedly limits federal review to legal rules in effect when the state court ruled—thus abandoning Teague's application on habeas of law announced after the state court ruled but before certiorari was due or denied (or even later, in two exceptional circumstances); and
- confines review to legal rules that bound the state courts when they decided the case—i.e., rules that were clearly established by this Court, and not just by a federal circuit court.[5]

This is what §2254(d) as amended says it does. But on the elaborate reading given it by the court below, the statute goes much further and in quite unrecognizable directions. On that reading, a federal court's finding of a constitutional violation in admitting an involuntary confession into evidence would

[5]Compare Ciak v. United States, 59 F.3d 296, 302-03 (2d Cir. 1995); Lewis v. Erickson, 946 F.2d 1361, 1362 (8th Cir. 1991) (relying on circuit precedent to show that rule was not "new" under Teague).

result in habeas relief only if the state court that upheld the violation somehow managed to misstate the one-word "voluntariness" test—only if its "opinion ... [in]correctly states the holdings" of Brown v. Mississippi and its progeny. A-18. If the state court has correctly articulated the rule but incorrectly applied it to the facts so as to produce an outcome that "errs" under established standards, the federal court (in all but a few "grave" cases, A-11) can exercise its "judicial Power" under Article III only by ineffectually pointing out the error. A-11. Though it is "free to express an independent opinion on [the] legal issues in the case," it cannot attach any legal consequence to its conclusion that the decision conflicts with "the supreme Law of the Land." A-10. Despite its statutory jurisdiction to review the state decision for conformity with the Constitution, it must leave the constitutionally erroneous decision in force.

And in deciding whether the state court's error was "unreasonable" or "grave," the court must consider that the requisite totality-of-circumstance analysis is "painted in shades of grey, rather than in contrasting colors." A-12. Consequently, the state court's "fact-specific answer cannot be called 'unreasonable' even if it is wrong." A-18 (emphasis added).

The reading below thus turns habeas corpus from a right to relief when a state court has erroneously applied clearly established law to the totality of facts into a summary denial of relief in that situation. It changes habeas from a remedy having every advantage over alternative remedies into one that is inferior to any remedy with the minutest possibility of success.

The court of appeals' attribution of these drastic consequences to the 1996 Act and their retroactive application to Mr. Lindh's case present five reasons for this Court's review, discussed in turn below:

I. The Act's Applicability to Pending Cases

The first two questions warranting this Court's review arise out of the decision below to apply amended §2254(d) retroactively to Mr. Lindh's four-year-old habeas petition. To apply the statute retroactively, the court of appeals had to disregard its terms and distort the governing rules set down in Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994). It is not surprising, then, that the court's decision

conflicts with those of all the other courts of appeals that have addressed these issues and with a large majority of district court decisions.[6]

A. Statutory Intent

In 1994, this Court recognized that its "precedents [had] left doubts about what default rule would apply in the absence of congressional guidance" on the question of the applicability of new statutes to pending cases. Landgraf, 114 S.Ct. at 1494. To resolve the "Congressional doubt concerning judicial retroactivity doctrine," id. at 1495, the Landgraf Court clearly informed Congress that future substantive legislation would normally be presumed not to apply to pending cases.

Just two years after Landgraf, Congress enacted the 1996 Act. Title I of the Act, entitled "Habeas Corpus Reform," contains essentially two sets of revisions of habeas law. First, Title I amends four of the preexisting habeas provisions in Chapter 153 of the Judicial Code. Second, Title I adds an entirely new chapter to the Judicial Code, Chapter 154, which consists of six provisions applicable only to capital cases from qualifying States that have opted to establish state postconviction procedures meeting certain requirements. §107(a), enacting 28 U.S.C. §§2261-2266. The Chapter 154 revisions are commonly referred to as the "opt-in" provisions. New §2254(d)—the revision applied by the court of appeals in this case—is one of the revisions to Chapter 153.

Presumably aware of Landgraf's recent crystallization of a "predictable background rule against which to legislate" and plainly mindful that Congress itself should "affirmatively consider[] the potential unfairness of retroactive application and determine[] that it is an acceptable price to pay for the countervailing benefits," 114 S.Ct. at 1501, Congress expressly specified those pending cases to which its 1996 revisions would apply. It did so in two particulars.

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[6]E.g., Huynh v. King, ___ F.3d ___, 1996 WL 506268 at *7 n.2 (11th Cir. Sept. 23, 1996); Boria v. Keane, 90 F.3d 36 (2d Cir. 1996); Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996); Cockrum v. Johnson, ___ F. Supp. ___, 1996 WL 42563 (E.D. Tex. July 25, 1996); Grady v. Artuz, 931 F. Supp. 1048 (S.D.N.Y. 1996); Warner v. United States, 926 F. Supp. 1387 (E.D. Ark. May 10, 1996).

First, in §107(c), Congress provided that "Chapter 154 of title 28, United States Code (as added by subsection (a) [of §107]) shall apply to cases pending on or after the date of enactment of this Act" (emphasis added). By §107(c)'s express terms, Congress identified which "cases pending on the date of enactment" would be subject to the revisions in the Act, and it identified which of the revisions would apply to those pending cases. Congress made all of the Chapter 154 revisions applicable to those pending capital cases that came from qualified opt-in jurisdictions.

Congress did not stop there. Had it enacted only §107(c), then only the new Chapter 154 provisions would have applied to the targeted pending cases; the revisions to Chapter 153 were not among those made applicable "to cases pending on ... the date of enactment." §107(c). But Congress was making important revisions to provisions within Chapter 153, particularly §2254(d) (the section at issue in this case) and §2254(e) (narrowing the availability of evidentiary hearings). Because none of Chapter 153's provisions was independently applicable to pending cases, Congress had to take an additional step, beyond specifying that Chapter 154's provisions would apply to pending cases, to make amended §§2254(d) and (e) applicable in pending cases governed by Chapter 154.

And Congress did so. It enacted a provision within Chapter 154—§2264(b)—that specifically assimilates the new §§2254(d) and (e) into the proceedings for those pending cases that fall within Chapter 154's reach.[7] Had Congress intended that the revisions in Chapter 153 would apply to all pending cases, there would have been no need to enact §2264(b), because §§2254(d) and (e) would have been independently applicable. Section 2264(b) can only be explained if Congress intended to do precisely what §107(c) indicates: to make only those pending cases that are covered by Chapter 154 immediately subject

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[7]Section 2264(b) provides that "[f]ollowing review subject to subsections (a), (d), and (e) of section 2254, the court [in a Chapter 154 case] shall rule on the claims properly before it." Although §2264(b) refers to §2254(a), which was not amended by the Act, that reference is entirely logical: once Congress expressly made §2254(d) and (e) applicable to pending cases within Chapter 154's scope, it added a reference to §2254(a) to forestall a court from concluding, based on "expresio unius est exclusio alterius," that Congress had intentionally excluded §2254(a).

to provisions of the 1996 Act.

Despite these clear indications in the Act, the court of appeals concluded that Congress did not answer the "retroactivity question," A-2, but left the matter for the judiciary to resolve. The court found that §107(c) raised "at most a negative implication" as to the Act's temporal reach and that this "negative implication" was "weaker for the 1996 Act" than the one rejected by this Court in Landgraf. A-3. Then, instead of reading §2264(b) in conjunction with §107(c), the court of appeals inferred—using the very "negative implication" reasoning that it had just rejected with respect to §107(c)—that §2264(b) was designed to strictly limit those provisions of Chapter 153 that would be applicable in any Chapter 154 proceeding, including cases filed after enactment. A-3 — A-4. The court's reasoning was flawed at virtually every step.

First, the lower court completely misapplied Landgraf by inferring that Congress "le[ft] the subject [of Chapter 153's retroactivity] to judicial resolution." Landgraf did draw such an inference with respect to the 1991 Civil Rights Act, but only because (1) Congress had included a retroactivity provision in a previous version of the Civil Rights Act that was vetoed and then had excluded the retroactivity provision from the version that was enacted, and (2) at the time the 1991 Act was passed, this Court's "precedents left doubts about what default rule would apply in the absence of congressional guidance." 114 S.Ct. at 1494. Nothing remotely akin to these considerations exists in the present case. Here, not only does no affirmative evidence exist that Congress intended to foist the retroactivity issue off on the courts, but Congress knew from Landgraf itself that if it didn't make a contrary intent clear, a presumption of prospective application only would prevail.[8]

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[8]The court of appeals speculates that "[p]erhaps" Congress simply "overlooked" the question whether Chapter 153 should be applied to pending cases because "the changes to Chapter 153 and the new Chapter 154 originated in different Houses of Congress at different times." A-3. This speculation is inaccurate. Although the substantive provisions of Chapter 154 did originate in a "different House[] of Congress at [a] different time[]" from those of Chapter 153, this is not true of the retroactivity provision of §107(c). This provision was added in the Senate, after the Chapter 154 provisions and nearly all the Chapter 153 provisions (including new §2254(d)) were already in the bill. Compare 141 Cong. Rec. S7567 (May 25,

Second, the court of appeals misanalyzed what it termed the "negative implication" argument based on §107(c). The court assumed that because Landgraf rejected a "negative implication" argument in that case, a "negative implication" argument should fail in every case. This misreads Landgraf. There, the "negative implication" argument was premised on a provision in the 1991 Civil Rights Act that made two "comparatively minor and narrow provisions in a long and complex statute" prospective only. Id. at 1493. From this, the petitioner argued that Congress intended the rest of the "long and complex statute" to apply retroactively. The Court did not agree. It based its decision in part on the logical conclusion that Congress would not have "chosen to resolve the retroactivity issue through negative inferences drawn from two provisions of quite limited effect," and in part on the "uncertainty about the applicable default rule" which existed at the time the 1991 Act was passed. Id. at 1493-94, 1494-95 & n.12.

This Court's careful and considered approach to the "negative implication" argument raised in Landgraf is at odds with the court of appeals' assumption that such arguments are invalid or suspect as a class. And the factors that Landgraf pointed to as reasons why the "negative implication" argument failed there are the opposite of the factors that exist in Mr. Lindh's case. The provisions upon which the so-called "negative implication" would be based in the present case are not "comparatively minor and narrow provisions" of "quite limited effect." Section 107(c) makes the entirety of Chapter 154 applicable to pending cases, and Chapter 154 by itself comprises fully half of the Act's habeas revisions. Nor, two years after Landgraf, was Congress unaware of what inferences would be drawn from its silence. The Landgraf decision itself told Congress, before it enacted the 1996 revisions to Chapter 153, what conclusion would be drawn if it did not specify whether those revisions applied to pending cases.

Third, the nonretroactivity conclusion to be drawn from §107(c) is corroborated by Congress' simultaneous enactment of 28 U.S.C. §2264(b). As Mr. Lindh argued below, §2264(b) has the function of applying to pending cases covered by Chapter 154 a few important provisions within the otherwise

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1995) (S.735) with S.735 at 119-20 (April 27, 1995).

nonretroactive Chapter 153. The court of appeals claimed that this reasoning "misunderstands" §2264(b). A-3. According to the court, §2264(b) is a statute that delineates which provisions in Chapter 153 will have any application in Chapter 154 proceedings, not a statute that delineates which amended provisions will apply to pending Chapter 154 cases. Under the court's reading, only the Chapter 153 statutes listed in §2264(b) are adopted into Chapter 154, and those omitted are—by negative implication—"replace[d] [with a provision] more favorable to the states." Id. (emphasis omitted).

The court of appeals' willingness to give effect to a "negative implication" in connection with §2264(b)—but not with §107(c)—is unexplained and inexplicable. Moreover, the court of appeals' reasoning falls of its own weight. For, contrary to the court's claim, its interpretation of §2264(b) will lead to rules that are not "more favorable to the states" in Chapter 154 cases. A-3. Consider, for example, the court of appeals' assertion that the exhaustion doctrine of §§2254(b) and (c) has been supplanted by §2264(a). A-3. This would mean that the state in a Chapter 154 proceeding will not be able to request that some claims be exhausted in state court—as, e.g., when a federal petitioner can establish that the factual predicate for an unexhausted claim he is raising "could not have been discovered through the exercise of due diligence" at an earlier time. 28 U.S.C. §2264(a)(3). Such claims could not be returned to the state courts for exhaustion (and for state-court factfindings due a presumption of correctness in subsequent federal habeas proceedings) because, under the court of appeals' theory, the exhaustion statute has been "replaced" by §2264(a). There is no evidence in the legislative history that this was Congress' intent.[9]

The court of appeals' conclusion that Congress has not prescribed the pending cases to which the Act exclusively applies was wrong. The court ignored the central teaching of Landgraf, expanded Landgraf's other case-specific holdings beyond plausibility, and disregarded Congress' clear intent. Because of these errors, and because of the importance of a proper interpretation of the Act to the

[9]The same "negative implication" that (according to the lower court) makes §§2254(b), (c), and (f)-(i) inapplicable to Chapter 154 proceedings would also make the rest of Chapter 153's provisions inapplicable—including, e.g., the Act's new limitations on successive habeas petitions, in amended §2244(b).

functioning of the federal courts, review should be granted.

B. Retroactive Effect

Landgraf teaches that if Congress has not clearly spoken concerning a statute's retroactive reach, a court must then determine "whether the new provision attaches new legal consequences to events completed before its enactment." 114 S.Ct. at 1499. The court below ruled that amended §2254(d) has no such effects. The court based this conclusion on two premises: (1) that "new legal consequences" are limited to those that adversely affect a party's "legitimate reliance interest in the operation of the former law," A-2; see A-5, A-7; and (2) that there is a "presumpti[on]" that "legal changes that reduce the willingness of federal courts to set aside state judgments ... apply to existing judgments." A-6. Both premises are wrong.

1. Permeating the court of appeals' analysis is its assertion that the only "new legal consequences" that "matter[]" for retroactivity purposes are those that adversely affect a litigant's" legitimate reliance interest in the operation of the former law." A-2; see A-5 — A-7. This transformation of the "new legal consequences" inquiry into a search for "legitimate reliance interests" is entirely unsupported in the caselaw.

Landgraf itself specified a wide range of ways in which a "new legal consequence" might be found, and by no means were these limited to situations involving a "reliance interest." Among the kinds of statutory provisions that Landgraf indicated have "retroactive effects" are those that (1) "affect substantive rights," 114 S.Ct. at 1504, or (2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," id. at 1505, or (3) have "an impact on private parties' planning," id. at 1506, or (4) "sweep away settled expectations suddenly and without individualized consideration," id. at 1497, or (5) "change[] the legal consequences of acts completed before [the new statute's] effective date," id. at 1499 n.23, or (6) "give[] 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were

performed," id., or (7) may "be retributive," id. at 1506, or (8) "creat[e] a new cause of action," id. at 1506, or (9) "chang[e] or abolish[] limits on the amount of damages available," id. at 1507 n.36, or (10) "restrict[] subcontractors' rights to recover damages from prime contractors," id. at 1507.

The court of appeals found that Congress had amended §2254(d) so as to transform Mr. Lindh's constitutional claim from one on which relief might well have been granted (see A-18) to one on which relief was impossible. The court did not deny that this reading constituted a change which "affect[ed] [petitioner's] substantive rights," 114 S.Ct. at 1504; "impair[ed] [statutory and constitutional] rights [petitioner] possessed" when he filed his petition, id. at 1505; and "change[d] the legal consequences" of completed state court proceedings, id. at 1499 n.23. Nor could the court reasonably have done so. If "changing or abolishing limits on the amount of damages available in wrongful death actions" is a "new legal consequence"—and if "restricting subcontractors' rights to recover damages from prime contractors" is, too—then changing the elements of a petitioner's already asserted claim, and limiting his preexisting right to relief for a constitutional violation, must also be "new legal consequences" under Landgraf. As the Second Circuit has held with respect to the 1996 Act, if "the new statute would require a different outcome, application of the new statute ... would be retroactive." Boria v. Keane, 90 F.3d 36, 37 (2d Cir. 1996). Any other conclusion flouts Landgraf.

Worse, the court of appeals' translation of "new legal consequences" into a "legitimate reliance interest" is a conceptual and practical disaster. This twist sends the courts down a long, chaotic, and uncharted road that can only lead to one of two unhappy destinations. Either every pending habeas case (indeed, every litigant's case, whenever any statute is amended without clear indications of congressional intent as to its application to pending cases) would have to be examined on an individual basis (as the court of appeals purported to do here, see A-8) to see what the party and his or her lawyers relied on in making significant litigation decisions in the case—an inquiry in which the courts would presumably have to conduct an evidentiary hearing as to the motives and bases of those decisions. Or, alternatively, the

courts would attempt to decide the issue of reliance on the basis of some generalized speculation as to what an entire class of litigants in petitioner's position would rely on (as the court of appeals also purported to do, see A-7 — A-8)—in which event, the courts would have to define the relevant class in each case: is it, e.g., all habeas petitioners?; all noncapital habeas petitioners?; all habeas petitioners with Sixth Amendment claims?; with claims involving "mixed questions of fact and law"?; all petitioners where the state court assumed the Constitution was applicable but refused to find a violation under the specific facts?

This Court's decisions culminating in Landgraf avoided diverting pending cases onto such a prolonged and ill-defined retroactivity sidetrack by broadly defining the concept of "new legal consequences." The court of appeals in this case, in contradiction to all decisions preceding it, has rerouted retroactivity analysis entirely. Certiorari should be granted to put the law back on track.[10]

The second permeating theme in the decision below is the assertion that "legal changes that reduce the willingness of federal courts to set aside state judgments presumptively apply to existing judgments." A-6; see A-7. This claim is meritless because the Court's "decisions do not support the proposition that there is a presumption in favor of retroactive application of [habeas-curtailing] statutes." Rivers v. Roadway Express, 114 S.Ct. 1483, 1518 (1994).

The court of appeals cited three kinds of decisions in support of its alleged presumption. The first was Felker v. Turpin, 116 S.Ct. 2333 (1996), in which this Court relied on one provision of the Act—

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[10]Even if one accepted the court of appeals' view that only "legitimate reliance interests" define "new legal consequences," it would be difficult to understand the court's insistence that Mr. Lindh showed no such interests. After the Wisconsin Supreme Court ruled in 1991, Mr. Lindh had to decide how to proceed. He could seek habeas relief in federal court, where the law at the time gave him a clear right to a de novo adjudication of his constitutional claim, or he could ask this Court to exercise its discretion to hear the case on certiorari. In reliance on the law as it then existed, Mr. Lindh gave up his chance for review by this Court, and opted for his right to de novo review via federal habeas corpus. That decision was informed by the fact that, at that time, this Court often declined to grant certiorari in "mixed question" cases precisely because commensurate federal habeas review was available. See, e.g., Wills v. Texas, 114 S.Ct. 1867 (1994) (O'Connor, J., concurring in denial of certiorari); O'Dell v. Thompson, 502 U.S. 995 (1991) (statement of Blackmun, J., respecting denial of certiorari); Spencer v. Georgia, 500 U.S. 960 (1991) (Kennedy, J., concurring in denial of certiorari); Irvin v. Indiana, 359 U.S. 394 (1959) (per curiam) (certiorari denied "without prejudice to filing for federal habeas").

disallowing this Court from granting certiorari to review a court of appeals' refusal to allow the filing of a successive federal habeas petition—in a case in which a successive petition was filed after April 24, 1996. Because Mr. Felker's petition was filed after the Act became law, no retroactivity issue was presented or decided in that case; still less was any "presumption" of retroactivity articulated.

The second kind of decision to which the court of appeals resorted as supporting a supposed presumption in favor of the retroactive application of habeas-curtailing legislation involved cases that it said applied previous habeas corpus amendments to pending habeas cases "without so much as remarking on the date of enactment." A-6. In three of the cases, there was a plain reason why no retroactivity question was discussed or decided: this Court was applying new statutes that simply codified existing judicial precedent.[11] In the fourth case—Carafas v. LaVallee, 391 U.S. 234, 239 (1968)—the Court's passing reference to an amended version of the habeas statute was included to show that the expansiveness of the new law supported the petitioner's arguments, which prevailed. Carafas has nothing whatsoever to say that might be relevant to a "habeas curtailing" amendment.[12]

The third kind of precedent cited by the court of appeals for its presumption about "habeas curtailing" amendments involves cases "holding that changes in the law affecting judicial ability to supply prospective relief govern pending cases." A-6. These holdings are utterly irrelevant. A grant of habeas relief operates retrospectively to vacate a prior unlawful judgment on the basis of past constitutional errors.

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[11]Smith v. Yeager, 393 U.S. 122, 124-25 (1968) (applying §2244(b), which codified Sanders v. United States, 373 U.S. 1 (1963)); Gusik v. Schilder, 340 U.S. 128, 131-33 & n. 4 (1950) (exhaustion rule was judicially created before being codified in §2254(b)); Darr v. Burford, 339 U.S. 200 (1950) (applying exhaustion requirement of §2254(b), which "embod[ied] the rulings drawn from the [Court's] precedents").

[12]There are cases—not mentioned by the court of appeals—that did explicitly discuss the question whether prior habeas amendments are retroactive. To the extent that these decisions resolved the issue, they decided that the amendments would not be applied to pending cases if they operated to the petitioner's detriment. Baines v. Swenson, 384 F.2d 621, 623 n. 3 (8th Cir. 1967) (presumption of correctness, added by 1966 amendment, is "inapplicable here since appellant's federal petition was filed before that date"); see also McDonald v. Kropp, 373 F.2d 549, 556-57 n.1 (6th Cir. 1967); Thompson v. MacDougall, 272 F.Supp. 313, 314 (D.S.C. 1967) (both noting retroactivity issue but avoiding it).

See Hilton v. Braunskill, 481 U.S. 770, 775 (1987) ("this Court has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court" (emphasis added)).

The court of appeals' "new legal consequences" ruling is based on an unprecedented transformation of the concept of "new legal consequences" and on an alleged "presumption" that it invented out of whole cloth. The Court should grant review to preserve the integrity of its retroactivity jurisprudence.

II. §2254(d)'s Interpretation and Application

A. §2254(d)'s Interpretation

Under §2254(d), a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits "unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court ...."

These words are in common usage. Their plain meanings dictate the provision's meaning. We begin where there is no dispute:

1. Because of the word "or," relief is permitted in either of two situations (quoted here without eclipses):

- If the state "adjudication resulted in a decision that was contrary to clearly established Federal law."
- If that "adjudication resulted in a decision that involved an unreasonable application of clearly established Federal law."

2. "The first phrase of §2254(d)(1)—authorizing a federal court to issue the writ when the state court's decision is 'contrary to ... clearly established Federal law ...', preserves rather than undermines federal courts' independent interpretive power." A-10. As commonly defined, the words "contrary to law" call for plenary consideration, and that is how federal courts have interpreted those words in analogous

contexts in which one judge reviews another judge's legal decisions.[13]

3. Neither the "decision contrary to law" phrase nor the "involved an unreasonable application" phrase should vitiate the other.

Three additional things are plain from §2254(d)(1)'s words, though the court below ignored them:

1. The thing that §2254(d)(1)'s first phrase requires federal courts to review to see if it is "contrary to law" is the state court's "decision." A decision is a "conclusion of law upon facts"[14]—in lay terms, a "final and definite result of examining a question"; a "conclusion" or "resolution"; the bottom line.[15] It is, in other words, the result a court reaches when it applies the law to the facts.

The court of appeals never addressed the word "decision" that forms the subject of §2254(d)(1)'s first phrase, "decision that was contrary to law." Disregarding the provision's plain English was the court's first important interpretive mistake. For that let the court come up with a very different subject of "contrary to law" analysis, namely, the legal rule that the state court articulated in its opinion. See A-18 (whether the state "opinion ... correctly states the holdings" of the controlling Supreme Court cases or "asked the legally correct question"). The court synonymously referred to "interpretations reached by state courts" (A-13), making clear, however, that such "interpretations" include only verbalized legal meanings, not meanings constructed by a rule's application to facts:

[13]See Webster's Ninth New Collegiate Dictionary 285 (1984) ("contrary to" means "in conflict with"). District judges review certain magisterial determinations to see if they are "contrary to law," 28 U.S.C. §636(b)(1)(A), Fed. R. Civ. P. 72(a), and circuit courts use the same phrase to describe their review of district court decisions of law under Fed. R. Civ. P. 52(a). In both contexts, the courts describe their review of legal questions as "plenary" or "de novo." See, e.g., Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 385 (9th Cir. 1994); Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993); Haines v. Liggett Group Inc., 975 F.2d 81, 91 (3d Cir. 1992); Polyplastics, Inc. v. Transconex, Inc., 827 F.2d 859, 860 (1st Cir. 1987); Gandee v. Glaser, 785 F. Supp. 684, 686 (S.D. Ohio 1992); Smith v. Smith, 154 F.R.D. 661, 665 (N.D. Tex. 1994).

[14]Black's Law Dictionary 842 (6th ed. 1990) (equating "decision" and "judgment"); see id. at 407 ("determination arrived at after consideration of the facts, and, in legal context, law").

[15]4 Oxford English Dictionary 332 (2d ed. 1989); Webster's Third New Intern'l Dictionary 585 (1981).

> [Under] the "contrary to ..." language ... we must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts—when it is, in the standard phrase, a "mixed question of law and fact"—[the "contrary to ..." language does not apply and] §2254(d) restricts the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application" of the law. (Id.)

2. The statute permits relief if, in the federal court's independent judgment, the state court decision was contrary to clearly established federal "law." At least since Justice Holmes observed that "law" is not a "brooding omnipresence" but "what the courts do in fact,"[16] this Court has understood that judges make "law" not only through "elaboration of constitutional principles" but also when "those principles ... [are] applied." Bose Corp. v. Consumer's Union, 466 U.S. 485, 508 (1984). Indeed, often "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case." Miller v. Fenton, 474 U.S. 104, 114 (1985) (emphasis added) (habeas case); see Ornelas v. United States, 116 S.Ct. 1657, 1662 (1996) (some "legal rules ... acquire content only through application").

In scores of the Court's opinions, therefore, "mixed questions of law and fact" have been "ranked as issues of law." Thompson v. Keohane, 116 S.Ct. 457, 465 (1995) (emphasis added) (citing numerous habeas cases).[17] And the Court "[o]n numerous ... occasions has set aside convictions" because, in its independent estimation, the law state courts made when they applied rules to facts was contrary to the Court's standards for such cases. Miller, 474 U.S. at 109.

The teaching of these cases is consistent with the established usage of "law" in American jurisprudence to encompass the meaning legal standards acquire when judges apply them to facts. That usage

[16]Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); O.W. Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897).

[17]See also, e.g., Kansas City S. Ry. v. C.J. Albers Comm'n Co., 223 U.S. 573, 591 (1912) (classically defining "mixed question" as one of law: "what purports to be a finding upon questions of fact [but] is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter" (emphasis added)); Moore v. Dempsey, 261 U.S. 86, 92 (1923) (habeas case); Fiske v. Kansas, 274 U.S. 380, 385-86 (1927); Norris v. Alabama, 294 U.S. 587, 589-90 (1935); Davis v. North Carolina, 384 U.S. 737, 741-42 (1966) (habeas case).

pinpoints the court of appeals' second major interpretive error: its conclusion that "the meaning of the Constitution" can never emerge from the Constitution's "application to a particular set of facts." A-11. Only through this astonishing proposition could the court conclude that, when federal judges review a state decision to "make certain that [legal] principles have been constitutionally applied," Bose Corp, 466 U.S. at 508, they are not determining whether "the decision was contrary to [constitutional] law." A-13.

3. The juxtaposition of §2254(d)(1)'s first phrase ("decision that was contrary to clearly established Federal law, as determined by the Supreme Court") and its second phrase ("decision that involved an unreasonable application of clearly established [Supreme Court] law") conveys more plain meaning. The "contrary to law" phrase applies, and can only apply, when there exists "clearly established" Supreme Court caselaw to which a state decision can sensibly be called "contrary." Conversely, if a question is one that the Court's cases have never addressed, a state court's answer can and must stand unless it applies the Court's peripherally pertinent precedents in an "unreasonable" manner. When, that is, there is no law to which the state decision can be "contrary," §2254(d)—again echoing Teague—"validates reasonable, good faith interpretations of existing precedents." Butler v. McKellar, 494 U.S. 407, 414 (1990).

Indeed, Justice O'Connor has used the very "unreasonable application" language to refer to precisely the question whether a state decision applies available law so unmindfully or inhospitably that the opposite conclusion requires no resort to "new law." See Gilmore v. Taylor, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (if the principles on which a prisoner relies are only broadly relevant, habeas relief may not be granted unless the state court decision was a "begrudging or unreasonable application of those principles" (emphasis added)).[18]

In reversing state decisions both in and outside the Teague context, this Court has identified

[18]Accord Thompson v. Keohane, 116 S.Ct. at 469 n.1 (Thomas, J., dissenting) (the Teague doctrine validates "reasonable applications of then-existing law"); see Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1032 n.18 (1992) ("objectively reasonable application of relevant precedents"); Florida v. Burr, 469 U.S. 914, 921 (1990) (Stevens, J., dissenting) ("reasonable application of ... precedent").

unreasonable applications of just the sort that §2254(d)(1) and Justice O'Connor describe. Prior to Stansbury v. California, 114 S.Ct. 1526 (1994), the Court had never decided whether an officer's subjective belief that a suspect was not "in custody" disposed of the question. But when the California Supreme Court held that it did, the Court easily concluded that the decision unreasonably applied principles implicit in a number of precedents discussing the attributes of custodial interrogation and focusing on the totality of, mainly objective factors. Id. at 1530.

Similarly, before Clemons v. Mississippi, 494 U.S. 738 (1990), the Court had left "open" the question whether the Eighth Amendment required resentencing when a court invalidated one of multiple aggravating factors that a jury balanced against mitigating factors to reach a death verdict. The Court previously had held that where the jury considered but did not weigh aggravators and mitigators, the invalidity of one of the aggravators did not require resentencing; and the Mississippi Supreme Court followed the latter rule in the "weighing" context. See Stringer v. Black, 503 U.S. 222, 230 (1992). To decide whether Clemons was Teague-barred on habeas, the Court first asked whether its rule "emerge[d] ... from any single case." Id. at 232. Because no case had "dictated" Clemons, the Court proceeded to consider the impact of more general precedent, eventually holding that the interplay of two "line[s] of authority"—the "general requirement of individualized sentencing and the more specific requirement that a sentence based on an improper factor be reassessed with care"—left "no arguable basis to support the view ... that at the time petitioner's sentence became final the Mississippi Supreme Court was permitted to apply a rule of automatic affirmance ... when one [of several aggravators] is invalid." Id. at 231 (emphasis added). Because, even before Clemons, no "reasonable minds could differ" about its rule, the rule applied in habeas. Id. For another example, see Tuggle v. Netherland, 116 S.Ct. 283, 285 (1995) (per curiam).

The court of appeals' third error was to ignore the meaning conveyed by §2254(d)(1)'s close juxtaposition of the phrases "contrary to clearly established law" and "unreasonable application of clearly established law." The first phrase applies if, but solely if, there is law on point to which a decision can

be contrary. The second phrase governs situations where merely adjacent law is available. Only by ignoring the "application[s] of law" to which Justice O'Connor referred in Gilmore, supra, and forgetting the central inquiry of the Teague line of cases and the other examples mentioned above could the court of appeals have imagined that the "unreasonable application" phrase would be vitiated if it were not read to monopolize mixed questions. It is, indeed, the court of appeals' reading that vitiates the statute, by limiting the decision-contrary-to-law phrase to the virtually null set of cases in which a state court miscopied a clearly established rule from the U.S. Reports into its opinion.

The court of appeals compounded this error by equating the statute's actual words, "application of law," with the distinct term-of-art for mixed questions: "application of the law *to the facts*." The equation is specious because legal authorities obsessively include the italicized words when referring to mixed questions,[19] but Congress omitted them.

The full impact of these errors emerges when the words of the statute Congress passed are compared to the very different words that the court of appeals imported into it. In Congress' version, a state court adjudication calls for relief if it

> resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

But in the court of appeals' version, a state court adjudication allows relief only if it

> resulted in a decision that was based on a stated rule or interpretation that was contrary to clearly established Federal law, as articulated [see A-11] in the decisions of the Supreme Court of the United States, or
>
> resulted in a decision that was based on an unreasonable application to the facts of clearly established Federal law, as articulated in the decisions of the Supreme Court of the United States.

Not only is the statute Congress wrote materially different from the one the court below concocted. The concoction is nearly identical to one Congress chose not to adopt.

The habeas title of the Antiterrorism Act began as the habeas title of a crime bill the House passed in early 1995. H.R.729, 141 Cong. Rec. H1404 (Feb. 8, 1995). Most of the House habeas title was imported wholesale into the 1996 Act. See S.735, 141 Cong. Rec. S5842 (Apr. 27, 1995). Not so §2254(d), which went into the Act only after Senate Judiciary Committee members rewrote it following "extended negotiations." See 141 Cong. Rec. S7803 (June 7, 1995) (Senator Specter). Yet each of the court of appeals' importations into the statute is a near identical throwback to the version Congress discarded. Under the House proposal, a state court adjudication would have given grounds for relief only if it:

> (1) resulted in a decision that was based on an arbitrary or unreasonable interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; [or]
>
> (2) resulted in a decision that was based on an arbitrary or unreasonable application to the facts of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States[.]

141 Cong. Rec. H1404 (Feb. 8, 1995) (emphasis added).

B. §2254(d)'s Application

The court of appeals' two reasons for denying Mr. Lindh relief reveal the severe repercussions of its reading of §2254(d).

1. The court acknowledged that "Roberts plainly would have been a 'witness against'" Lindh for Confrontation Clause purposes at a "unitary" trial at which Lindh had the burden of proving insanity. A-17. The court, however, thought it not "clearly established" that the bifurcated sanity phase was a "criminal prosecution[]" for Sixth Amendment purposes. A-15. Wisconsin's sanity phase (see A-1, A-22) (a) begins with a plea of "not guilty by reason of mental disease" and ends with a jury verdict of either "guilty" or "not guilty by reason of mental disease"; it (b) is a necessary predicate, upon a jury's finding that the

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[19] See, e.g., United States v. Gaudin, 115 S.Ct. 2310, 2314 (1995) ("application-of-legal-standard-to-fact sort of question ... commonly called a 'mixed question of law and fact'"); Ornelas, 116 S.Ct. at 1663 (Scalia, J., dissenting) ("application of an objective legal standard to the facts ... is properly characterized as a mixed question"); Thompson, 116 S.Ct. at 465 ("application of the controlling legal standard to the historical facts ... presents a 'mixed question of law and fact' qualifying for independent review"); Wright v. West, 505 U.S. 277, 300 (1992) (O'Connor, J., concurring in the judgment) ("so-called mixed questions or the application of constitutional principles to the facts"); Wainwright v. Witt, 469 U.S. 412, 429 (1985) ("'mixed question'" is present if "trial court's function was application of law to fact").

defendant lacks a mental disease, to the entry of "a judgment of conviction" against him (C-3); it (c) was treated by all three Wisconsin courts and the lawyers for both sides in those courts as governed by the Confrontation Clause;[20] and it (d) formally determined whether the minimum sentence that Lindh would have to serve before becoming eligible for release was 6 months in a mental hospital or 284 months in prison. See supra p.4.

The court below thought that Specht v. Patterson, 386 U.S. 605 (1967), did not "clearly" resolve the matter, A-17, although the only ground on which it could distinguish Specht—and the only respect in which Mr. Lindh's claim is not manifestly a fortiori from Specht—is that Specht's second-phase proceeding affected his maximum incarceration period while Lindh's affected his minimum incarceration period. This is literally a distinction without a difference. Nothing in Specht, nothing in the Confrontation Clause, and nothing said or hinted by the court of appeals remotely suggests the vaguest, most vagrant reason why the distinction could make any difference. If Specht did not "clearly establish" the applicability of the Confrontation Clause to Lindh's sanity trial, no constitutional decision of this Court has precedential value beyond its individual, episodic circumstances.

2. The court below was also unable to conclude that the Wisconsin Supreme Court's application of the Clause to Lindh's case "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [Supreme Court] law." A-18. Although "some members" of the majority and three dissenting judges believed that the state decision was "wrong" under established law, A-18, A-26, the majority as a whole did not find it necessary to decide that question. Rather, the majority held that: (a) The Wisconsin court's "opinion ... correctly state[d]" this Court's Confrontation Clause doctrine and so was not "contrary to law." A-18. That doctrine, as articulated by the majority opinions in both the Wisconsin Supreme Court and the court below, gives a trial judge discretion to preclude all cross-examination into a particular ground for bias, as long as the judge permits the cross-examiner to inquire in some other way into the possibility that a prosecution witness is lying.[21] Id. (b) The validity of the state court decision thus came down to that court's handling of an abuse-of-discretion issue, a "mixed question" as to which §2254(d) does not "authorize issuance of a writ whenever a [state] court errs" but only when it errs "unreasonab[ly]." A-11. (c) Given the "deferential review" reserved "for [such] operational decisions," and given that the question "addresses a matter of degree about which thoughtful people can, and do, differ," the state court's "fact-specific answer cannot be called 'unreasonable' even if it is wrong." A-18.

We have already identified the errors of statutory construction that undermine this analysis. They are compounded by the acceptance of an adulterated form of Sixth Amendment doctrine that makes the right of confrontation largely discretionary with the trial judge. This is not the confrontation right that this Court has repeatedly enforced. Because "the partiality of a witness ... 'is always relevant,'" Davis v. Alaska, 415 U.S. 308, 316 (1974), "the Confrontation Clause ... requires a defendant to have some opportunity to show bias on the part of a prosecution witness." United States v. Abel, 469 U.S. 45, 50 (1984) (emphasis added). The opportunity extends to any fact that a witness may divulge which "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). And at least since Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam), it has been crystal clear that no matter how much cross-examination a trial court permits into other reasons for finding that a witness is lying, the trial judge does not have discretion to completely forbid the defendant's cross-examination into facts from which a "reasonable jury" could infer a motive to lie. Id. at 228, 232-33.

* * * * *

Besides the court below, three federal circuit courts have interpreted amended §2254(d). In square

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[20]By holding back until federal court the argument that the Sixth Amendment does not apply to Wisconsin's sanity phase, the state prevented that issue from being "adjudicated on the merits in State court proceedings" and, thus, from satisfying the predicate for §2254(d)'s application. But see A-15 — A-16.

[21]The state has conceded that the trial judge "wholly precluded" Lindh from cross-examining Dr. Roberts as to bias or motive to lie. Panel Brief, 31.

conflict with the decision below, all three granted relief on the basis of a state court's erroneous resolution of a "mixed question of law and fact"—in each case affording the petitioner plenary review under the "decision contrary to law" phrase, not "deferential" review under the "unreasonable application" phrase. Baylor v. Estelle, ___ F.3d ___, 1996 WL 497045, at *2-3 (9th Cir. Sept. 4, 1996); Dickerson v. Vaughn, 90 F.3d 87, 89, 92 (3d Cir. 1996); Ayala v. Speckard, 89 F.3d 91, 92, 97 (2d Cir. 1996). Certiorari should be granted to resolve the conflict between these decisions and the decision below, and between that decision and §2254(d)'s plain language, established principles regarding the interpretation of law, and—as we next demonstrate—the "cardinal principle" that courts should read federal statutes to avoid constitutionally questionable incursions on the function of Article III judges. See, e.g., Johnson v. Robison, 415 U.S. 361, 366-67 (1974).

III. Constitutionality Under Article III

The court of appeals' linguistically and jurisprudentially vexed reading of §2254(d)(1) unnecessarily put it in a bind. For it forced consideration of the constitutional power of Congress to require Article III judges to consider whether a state decision is contrary to the supreme law of the land while telling them to leave the decision in force and effect when it is.

No branch of our constitutional government may impair another Branch's "essential role ... in the constitutional plan." Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953); see, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128, 145-47 (1871). Indeed, this conception of the protected sphere of each separate branch must itself be taken as "inherent in the constitutional plan." Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934).

The court of appeals recognized this principle. It identified as an essential attribute of the "judicial Power of the United States" which Article III, §1 vests in "such inferior Courts as the Congress may from time to time ordain and establish" that "Federal courts acting within their jurisdiction ... [must be] entitled

to interpret the law independently." A-11. "Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired." A-13.

The problem is that the court of appeals stopped precisely there—or, in truth, about half-way there. It concluded that this essential attribute of the judicial power is preserved as long as "Federal courts are free to express an independent opinion on all legal issues in the case." A-10 (emphasis added). Congress may then forbid those courts to do anything to effectuate their opinion: Under the rubric of "[r]egulating relief," Congress may compel a federal judge to tolerate a state-court decision that the judge is statutorily required to review under the Constitution and that, in the judge's "independent opinion," conflicts with the supreme law of the land. A-13.

Moreover, in defining the "legal issues in the case" on which the federal courts must be "free to express an independent opinion," the court entirely excluded any dispute arising from "the Constitution['s] ... application to a particular set of facts—when it is, in the standard phrase, a 'mixed question of law and fact.'" A-11. A dispute of that sort, it concluded, "lies not in the meaning of the Constitution" and thus is outside the federal judges' constitutionally essential "independent interpretive power." Id.; A-10 (emphasis added). It was this conclusion that enabled the court to profess simultaneously that (1) "Congress lacks power ... to require federal judges to 'defer' to the interpretations reached by the state courts" (A-12), but that, (2) once having provided "[d]e novo ... review for core legal issues, such as whether the Confrontation Clause applies," Congress may then prescribe "deferential review for operational decisions" such as whether a trial court's denial of cross-examination violates the Clause (A-18).

These rulings trivialize what the Constitution makes essential. We have already noted the basic conceptual flaw in the latter one: It amputates at least half of what it means to "interpret the law." The notion that a dispute over the proper answer to a mixed question of law—a dispute over how the Constitution applies to a particular set of facts—lies "not in the meaning of the Constitution" is radically irreconcil-

able with this Court's frequent recognition in mixed question cases that "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case." Miller v. Fenton, 474 U.S. at 114 (emphasis added).

Nor has the Court excluded mixed questions from the federal courts' constitutionally essential independent interpretive function simply because they are "painted in shades of grey, rather than in contrasting colors." A-12. As Justice Holmes saw long ago, that rule would vitiate the interpretive function as to all "[t]he great ordinances of the Constitution," which "do not establish and divide fields of black and white" but "terminate in a penumbra shading gradually from one extreme to the other." Springer v. Government of the Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). No matter how much a "matter of degree" is the mixed question under review, therefore, the Court has never

> held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

Wright v. West, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). Marbury indeed establishes the proposition:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.... This is the very essence of judicial duty.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (emphasis added).

Even more demeaning to the judicial function is the conclusion that, in order to "[r]egulat[e] relief," Congress may entirely forbid Article III judges to effectuate their opinion that a state decision they are directed to evaluate under the Constitution is constitutionally "wrong." A-13, A-18. Once the lower federal courts are created by Congress and conferred with jurisdiction, Article III vests in them "the judicial Power." U.S. Const. art. III, §1. As the italicized word makes plain, what is vested is a practical thing, an effective thing, not merely its symbol. "[W]hen called into existence and vested with jurisdiction," federal courts "become possessed of the [judicial] power," and "the attributes which inhere in that

power and are inseparable from it can neither be abrogated nor rendered practically inoperative." Michaelson v. United States, 266 U.S. 42, 65-66 (1924) (emphasis added). "[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy— with the understanding, in short, that ... a 'judicial Power' is one to render dispositive judgments." Plaut v. Spendthrift Farm, 115 S.Ct. 1447, 1453 (1995) (second emphasis added). "If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) (emphasis added).

The great object of this practical "power" is not judicial independence itself, but what is achieved by the judge's ability to interpret national law independently, namely, the preservation of that law's supremacy. A legal "declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936) (emphasis added). As this Court recognized only last Term, maintaining national legal supremacy requires judicial independence—and proscribes "deference"—not only in articulating legal rules (e.g., that searches require "probable cause") but also in applying those rules to the facts:

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law.

Ornelas v. United States, 116 S.Ct. at 1662 (citation omitted). And the Supremacy Clause makes clear that this "end" of a "unitary system of law" to which the judicial power is committed has a special force when the decisions Congress has directed federal judges to review are those of "Judges in every State":

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof;

> and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, ¶2.

The court of appeals' construction of §2254(d), and of Article III to permit a statute thus construed, banish from both statute and Constitution everything that is practical about the "judicial Power" to keep national law supreme. In 28 U.S.C. §2241(c)(3), Congress has given Article III judges the duty to determine whether a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." Section 2254(a) tells them that they "shall entertain an application" for relief on those grounds. Section §2243 says they "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." And amended §2254(d) directs them, in the process of adjudicating that "application," and in deciding what "law ... require[s]," to review the state court "decision" affirming the applicant's allegedly unconstitutional custody to determine whether it is "contrary to, or involved an unreasonable application of, clearly established [Supreme Court] law."

Inevitably, some federal judges following these directives will conclude—as some did here—that the state decision "is wrong" as a matter of clearly established law. A-18. When that occurs, the question becomes what those judges can do, in the practical exercise of their "judicial Power," to maintain national law as "the supreme Law of the Land"? How can they get beyond the "appearance" to "the reality of control by Article III judges over the ... application of federal law"? Pacemaker, 725 F.2d at 544. How can they get beyond being able to "rule on cases" to being able "to decide them"? Plaut, 115 S.Ct. at 1453. How, that is, can they make their "judgment[]" that the state court decision is wrong "dispositive" and not "practically inoperative"? Id.; Michaelson, 266 U.S. at 66.

The answer that the court of appeals reads §2254(d) to give, and Article III to permit, has nothing about it that is "power[ful]," "real[]" or "practical[]." The answer is, "Nothing." The appearance of judicial independence—the power to rule on cases—is maintained: "Federal courts are free to express an indepen-

dent opinion" that the state decision is "wrong." A-8, A-18. But the power to decide cases, to do something dispositive about that wrong ruling, is withheld: "we do not read [§2254(d)] ... to authorize issuance of a writ whenever a court errs." A-11.

The inevitable result of requiring federal courts to deny relief is to keep them from fulfilling their essential function in the constitutional plan. It forces the courts, having first been enlisted by Congress to scrutinize legal decisions for consistency with the Constitution, to leave in force and effect what they have independently determined to be law in conflict with the "supreme Law of the Land." For, when a legal principle is "given meaning" through its "application to the particular circumstances of a case," Miller, 474 U.S. at 114, and when that meaning is wrong, it is only by neutralizing that application—through which a prisoner is "in custody in violation of the Constitution"—that the Constitution's supremacy can be restored. What the Court has said about the federal courts' power to review the constitutionally consequential factfindings of an administrative agency applies with no less force to the consequential legal determinations of "the Judges in every State":

> But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

St. Joseph Stock Yards Co., 298 U.S. at 52; see Chapman v. California, 386 U.S. 18, 21 (1966) ("Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional principles themselves mean, what they guarantee, and whether they have been denied." (emphasis added)).

The court of appeals' understanding corrupts as well as trivializes "the judicial Power." For it treats as a constitutionally sufficient role for judges what this Court repeatedly has called illegitimate because it is beyond the judicial power, namely, the giving of advisory opinions. See Flast v. Cohen, 392 U.S. 83, 96 (1968). It thus will not do to sustain §2254(d) as reconstructed because it leaves federal courts "free to express an independent opinion on all legal issues in the case" (A-10) while robbing those

opinions of any legal force or effect. The federal courts' "power is to correct wrong judgments, not to revise opinions." Herb v. Pitcairn, 324 U.S. 117, 126 (1945) (emphasis added). So, "if the same judgment would be rendered by the state court after we corrected its views of federal law"—and, a fortiori, if the judgment will be left intact after the federal court gives its book report—"our review could amount to nothing more than an advisory opinion," which "[w]e are not permitted to render." Id. at 126.

The court of appeals' two most egregious mistakes converge in its claim that its reading of §2254(d) is no more constitutionally remarkable than "rights without remedies." A-13. For it is only because the court believes that state court decisions make no law when they apply rules to facts that it can equate denying relief from an erroneous state court decision with denying damages to a citizen unconstitutionally rousted from his home at the end of a police officer's nightstick. See Anderson v. Creighton, 483 U.S. 635 (1987). Yet, as we have seen, a state judge's "wrong" decision makes "law" in a way that the unconstitutional stroke of a police officer's baton can never do, no matter how hard it falls. That, of course, is why the Supremacy Clause singles out "the Judges in every State," but not the constables, as those whose uniquely law-making function requires that they be "bound" by the "supreme Law of the Land." And that is why the federal courts' essential function of keeping federal law supreme requires them to annul a state court's constitutionally erroneous legal decision, but not to remedy every police officer's constitutional tort.[22]

The other precedents the court cites to bolster its view that Congress may order federal courts to leave unconstitutional law in effect are no more apt. The statute it created has no precedent in our law:

1. Inferior courts acquire "judicial Power" only when Congress "from time to time ordain[s]" by

[22]The court of appeals' analogy to United States v. Leon, 468 U.S. 897 (1987), is even weaker. As Leon makes clear, excluding illegally seized evidence is not a remedy for the society-focused harm that unreasonable searches cause and, instead, is a prophylactic rule designed to deter future violations. When a court admits evidence unlawfully seized by a police officer in the good faith execution of a search warrant, therefore, it is the case neither that the court has preserved the effect of a legal decision that conflicts with the Constitution nor that it has denied a remedy to a wronged individual.

giving them jurisdiction over selected controversies. U.S. Const., Art. III, §1. For this reason, the many examples the court below cites of judges failing to override—or, rather, failing to review—state decisions, or aspects of those decisions, over which the judge had no power or jurisdiction are inapposite. In this category are cases refusing to inquire into a decision's legality under the Full Faith and Credit Clause, the res judicata doctrine, the rule of Stone v. Powell, 428 U.S. 465 (1976), and the absolute immunization from damages of judges acting in their law-making capacity, see Stump v. Sparkman, 435 U.S. 349 (1978). In none of these cases was a court statutorily directed to leave a decision in force after first (1) being statutorily directed to review the decision for consistency with the Constitution; and (2) finding them inconsistent. See Yakus v. United States, 321 U.S. 414, 468 (1943) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them."); Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2234 (1995).

2. Equally inapposite for the purposes the court below tried to put them are the various cases accepting Congress' power to prescribe the controversies over which federal courts have "judicial Power" by specifying the body of law that defines those controversies and, in the process, screening out different controversies arising under different law. Indeed, this is the plain intent of amended §2254(d) as Congress wrote it, when taken in pari materia with unamended §2243. Section 2243 directs the court to "hear and determine the facts, and dispose of the case as law and justice require" (emphasis added). Amended §2254(d) then provides the choice-of-law rule for the "law" to which §2243 refers, namely, "clearly established Federal law, as determined by the Supreme Court of the United States." The Teague and Erie cases that the court below cites thus provide ample precedent for the choice-of-law statute actually enacted by Congress, but they provide none for the identify-unconstitutional-decisions-but-leave-them-in-force provision which the lower court substituted.

The Chevron doctrine is to similar effect. Under it, federal courts recognize situations in which

Congress has intentionally left statutory language undefined and either explicitly or implicitly delegated to an administrative agency the task of defining the language through supplementary positive law that Congress means to have the same force as the statute. See Medtronic, Inc. v. Lohr, 116 S.Ct. 2240, 2255-56 (1996); Chevron, Inc. v. NRDC, 467 U.S. 837, 843-44 (1984). In these situations, the reviewing court never leaves intact an administrative definition of statutory language that it considers to be "wrong" as a matter of law. Rather, the court (independently) decides whether the agency has acted within its statutorily delegated authority to define ambiguous language and, if so, follows Congress' directive to treat the law Congress' delegate has made as the law that applies. See Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 27-31 (1983).

3. Nor do harmless error rules (or their "inevitable discovery" variant in Fourth Amendment law) support the court of appeals' denigration of "the Judicial power." If no result of the state court's decisionmaking is attributable to any legal analysis or procedure that a federal court determines to be "wrong," then whatever result the state court reached creates no erroneous federal law that "the judicial Power" commits a federal judge to correct.[23] Indeed, the harmless error rule is simply the flip side of the principle that the court below ignored: If the result the state decision reaches does give the Constitution an erroneous meaning—whether or not the state court enunciates an erroneous rule—the Constitution does not permit a federal judge to allow that meaning, and the result that creates it, to stand.

Congress has never adopted a statute of the sort the court below envisioned. That is not surprising because the constitutionality of such a statute would depend on a conception of Article III judges' independent interpretative function that excludes most of what judges in fact do, and a conception of "the judicial Power" that leaves judges powerless to effectuate their interpretations. The Court should grant

[23]The "adequate and independent state ground" doctrine is to like effect: If, given state procedural law, the outcome of the state proceeding would be the same, no matter what position the state court has taken on matters of federal law, then the state decision makes no federal law of a sort that could undermine the supremacy of national law, and "the judicial Power" to overturn legally wrong decisions is not triggered.

review to consider whether the Constitution sustains these dubious conceptions and, preliminarily, whether §2254(d)'s plain language actually presents that serious constitutional question.

IV. Constitutionality Under the Suspension Clause

Subsumed within Point III is a narrower one. Because no federal judge has ever been required to review a legal decision under federal law but leave it in force despite its conflict with federal law, such an anomalous procedure is completely alien to the history of habeas corpus. Since 1789, federal habeas judges have had the power to review judicial decisions for consistency with federal law (1 Stat. 73, 81-82); and they have always exercised that power by relieving their petitioners of the effects of such decisions within their jurisdiction when the decisions were found to be contrary to federal law.[24] Whether the writ the Suspension Clause protects is the one that "exists today ... [or] existed in 1789," Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996), an essential function of it has been to preserve the supremacy of federal law.[25] By eviscerating that function, the reading of §2254(d) below effectively suspends the writ. "[F]or if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." Ex parte Bollman, 8 U.S. (4 Cranch) 75, 95 (1807); see Smith v. Bennett, 365 U.S. 708, 712-13 (1961). The Court should grant review to resolve this additional conflict between the decision below and longstanding judicial interpretations and practice.

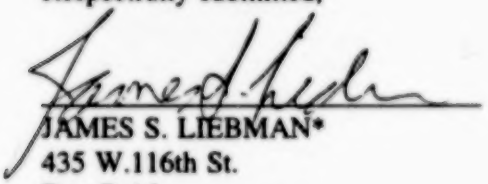
CONCLUSION

For the reasons set out above, the Court should grant a writ of certiorari to review the decision of the court of appeals.

[24]See, e.g., United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795); Ex parte Burford, 7 U.S. (3 Cranch) 448 (1806); Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807); Ex parte Watkins, 32 U.S. (7 Pet.) 568 (1833); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); Ex parte Siebold, 100 U.S. 371 (1879).

[25]See, e.g., Reed v. Farley, 114 S. Ct. 2291, 2297 (1994) (plurality opinion); Rose v. Mitchell, 443 U.S. 545, 561 (1979); Darr v. Burford, 339 U.S. 200, 214-15 (1950).

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

October 9, 1996

APPENDIX A

Copy mailed to petit attorneys for parties by the Court pursuant to Fed. R. Civ. P.77(d).

RECEIVED
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STATE PUBLIC DEFENDER
MADISON APPELLATE

U.S. DIST. COURT EAST DIST. WISC.
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at _____ o'clock _____ m
SOFRON B. NEDILSKY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JUL 24 1992

AARON LINDH,

Petitioner,

v. Civil Action No. 92-C-0690

JAMES P. MURPHY, Warden,

Respondent.

DECISION AND ORDER

For the reasons below, this court grants petitioner Aaron Lindh's petition to proceed in forma pauperis and orders the respondent to answer or otherwise respond to his petition for writ of habeas corpus filed pursuant to Title 28 United States Code § 2254.

Background

After a bifurcated trial in Dane County Circuit Court, petitioner Aaron Lindh ("Lindh") was found guilty of: (1) one count of carrying a firemarm in a public building in violation of § 941.235 of the Wisconsin Statutes, (2) two counts of first degree murder with use of a dangerous weapon in violation of Wis. Stat. §§ 939.63 and 940.01, and (3) one count of attempted first degree murder with use of a dangerous weapon in violation of Wis. Stat. §§ 939.39, 940.01, and 939.63. On September 27, 1988, the trial court entered judgment of conviction sentencing Lindh to two consecutive life sentences plus a term of 35 years, 90 days.

AO 72A
(Rev. 8/82)

On July 9, 1992, Lindh filed the instant § 2254 petition, in which he attacks his conviction on grounds that (1) the trial court violated the confrontation clause by precluding cross-examination of the state's psychiatric witness regarding bias, and (2) the trial court erred in failing to suppress inculpatory statements taken during the state's interrogation of Lindh.

Lindh claims to have raised both of these issues on direct appeal before the Wisconsin Court of Appeals and the Wisconsin Supreme Court.

Analysis

A litigant is entitled to commence an action in forma pauperis if (1) he is unable to pay the filing fee, and (2) the action is neither frivolous nor malicious. 28 U.S.C. § 1915(a) and (d). An action is frivolous under § 1915(d) if it alleges clearly baseless facts or lacks an arguable basis in law. Denton v. Hernandez, ____ U.S. ____, 112 S.Ct. 1728, 1733 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989). This court takes as true all well-pleaded allegations in this pro se complaint and construes such allegations liberally in favor of the petitioner. See Haines v. Kerner, 404 U.S. 519 (1972) (per curiam).

Rule 4 of the Rules Governing Habeas Corpus Cases Under § 2254 further requires this court to dismiss the petition summarily if "it plainly appears form the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . ."

Lindh shall be permitted to proceed in forma pauperis on both issues raised in his petition, because both state potential constitutional claims and Lindh claims to have exhausted his available state remedies with respect to both issues. See 28 U.S.C. § 2254(b); Crump v. Lane, 807 F.2d 1394, 1395 (7th Cir. 1986).

IT IS THEREFORE ORDERED that petitioner Aaron Lindh's July 9, 1992 petition to proceed in forma pauperis is GRANTED.

IT IS FURTHER ORDERED that within twenty (30) days from the date of this order respondent James P. Murphy shall answer or otherwise respond to Aaron Lindh's § 2254 petition.

Dated at ~~Milwaukee~~ Door County, Wisconsin, this 24th day of July, 1992.

BY THE COURT:

John W. Reynolds
Senior Judge

APPENDIX B

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, Warden

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AFFIDAVIT IN SUPPORT OF
REQUEST TO PROCEED IN FORMA PAUPERIS

State of Wisconsin)
)ss.
County of Columbia)

I, Aaron Lindh, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ☒ No ☐

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

$130.00 per month, employed by Columbia Correctional Institution % CCI P.O. Box 900 PORTAGE, WI. 53901. Prison Labor

b. If the answer is no, state the date of last employment and the amount of salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources.

a. Business, profession or other form of employment: Yes ☐ No ☒

b. Rent payments, interest or dividends: Yes ☒ No ☐

c. Pensions, annuities or life insurance payments: Yes ☐ No ☒

d. Gifts or inheritances: Yes ☒ No ☐

e. Any other sources: Yes ☐ No ☒

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months. Income money on Deposit account approximately almost $10.00.

$100.00

3. Do you own any cash, or do you have money in a checking or savings accounts? Yes ☒ No ☐ (include any funds in prison accounts).

If the answer is yes, state the total value of the items owned. $500.00 in a saving account, $1500.00 in a regular checking account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ☐ No ☒ A.L.

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. No.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Aaron Lindh

Aaron Lindh

Subscribed and sworn before me
this 27th day of September, 1996

Terri A Koss

Notary Public, State of Wisconsin
My commission expires: 1-16-2000

Respectfully submitted,

James S. Liebman

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ATTORNEYS FOR PETITIONER

DATED this 2d day of October, 1996.

96-6298

ORIGINAL

No. 96-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURTS OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX A

Aaron LINDH, Petitioner-Appellant,
v.
James P. MURPHY, Warden, Respondent-Appellee.

No. 95-3608.

United States Court of Appeals,
Seventh Circuit.

Argued April 9, 1996.

Reargued En Banc June 17, 1996.
Decided Sept. 12, 1996.

appeal from the united states district court for the eastern District of Wisconsin. No. 92-C-690--Rudolph T. Randa, Judge.

Before POSNER, Chief Judge, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

*1 In January 1988 Aaron Lindh marched into the City-County Building of Madison, Wisconsin, and shot three strangers for no apparent reason. Two died. Lindh pleaded guilty to carrying and using a firearm in a public building; a jury convicted him of two murders and one attempted murder. During the second phase of a bifurcated proceeding, Lindh argued that he was insane at the time of the shootings, which under Wisconsin law would alter the place of his confinement (from a prison to a prison-hospital) and entitle him to release if at some future time he should be deemed "recovered." But the jury found that Lindh did not have a mental disease when he pulled the trigger, and the judge sentenced him to life plus 35 years in prison.

Lindh's principal contention on appeal was that the judge unduly restricted his cross-examination of Dr. Leigh Roberts, a psychiatrist who interviewed him on the day of the shootings (and several times thereafter) and testified for the prosecution during the second phase of the trial. During March 1988 Roberts learned that he was under investigation for engaging in improper sexual conduct with a female patient; in May 1988 Roberts learned that the Medical Examining Board was looking into allegations made by three female patients. By the time of trial in September 1988 a criminal investigation was ongoing- conducted by the Milwaukee County District Attorney, acting as a special prosecutor after the Dane County District Attorney (whose jurisdiction includes Madison) recused himself. Lindh's attorney sought to explore the allegations made against Roberts, contending that the pending investigation would give Roberts a reason to slant his testimony in the prosecution's favor. Lindh did not argue that Roberts had entered into discussions with the prosecutor about the sexual misconduct allegations; any plea agreement or negotiations in progress would have been subjects of cross-examination under Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Instead Lindh argued that even if the Dane County prosecutor could not provide a quid pro quo by forgoing charges or reducing their severity, he might put in a good word with the Milwaukee prosecutor; and whether or not lenity was in the cards, Roberts might believe that he had something to gain from helping to convict Lindh, which could color his analysis and testimony. Lindh argued that both state law and the Confrontation Clause of the Sixth Amendment, applied to the states by the due process clause of the Fourteenth, entitled him to cross- examine Roberts about all potential sources of bias. See Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); United States v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

*2 The trial judge foreclosed inquiry into this subject (although he permitted extensive cross-examination on other matters), the court of appeals reversed, State v. Lindh, 156 Wis.2d 768, 457 N.W.2d 564 (Wis.App.1990), and the Supreme Court of Wisconsin reversed in turn, reinstating the sentences, State v. Lindh, 161

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WESTLAW

Wis.2d 324, 468 N.W.2d 168 (1991). The state's highest court concluded that the possibility of bias was so remote, given the appointment of a special prosecutor, and the prospect of diverting attention to the sexual encounters (a subject of no relevance to Lindh's sanity) sufficiently great, that the trial judge did not abuse the discretion he possessed under both state and federal law. Justice Abrahamson dissented on state-law grounds. 468 N.W.2d at 185-89. Lindh then commenced a collateral attack in federal court. The district court denied the petition, writing that it "agrees wholeheartedly with the analysis of" the state's Supreme Court. Lindh appealed to this court.

Fifteen days after a panel heard oral argument, the President signed the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214. Section 104 of the new statute amends 28 U.S.C. § 2254, the law under which Lindh seeks relief. Unaffected by the 1996 Act, § 2254(a) provides that a writ of habeas corpus may issue "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." It does not further elaborate. Federal courts exercising their authority under § 2254(a) disregarded the state courts' legal conclusions and reached independent judgments on issues presented to them. Brown v. Allen, 344 U.S. 443, 458 (1953). Section 104(2) of the 1996 Act redesignates the former § 2254(d), which deals with state courts' findings of fact, as § 2254(e); § 104(3) of the 1996 Act, 110 Stat. 1219, adds a new § 2254(d) that for the first time specifies the appropriate treatment of legal determinations by state courts:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. We set this case for reargument before the full court in order to decide whether the new provision applies to pending cases and, if it does, how it affects them. We invited and received supplemental briefs from the parties, and we have had the benefit of briefs from the American Bar Association and a group of former federal judges as amici curiae.

I

*3 Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), lays out a sequence of issues. First we must decide whether Congress has decided to which cases a new law applies; if it has, the only task is to follow the statute. If Congress has not provided one way or the other, we must apply the law in force at the time of decision--which is to say, the new § 2254(d)--unless "the new provision attaches new legal consequences to events completed before its enactment." 114 S.Ct. at 1499. But what is a "new legal consequence"? Landgraf says that not every change in outcome counts; it matters whether the party adversely affected by the change has legitimate reliance interests in the operation of the former law.

A

Has Congress answered the question at hand? Not directly. Section 104 of the 1996 Act lacks an effective-date provision. Lindh contends that Congress addressed the subject indirectly, by providing that the new Chapter 154 of Title 28 (28 U.S.C. §§ 2261-66), captioned Special Habeas Corpus Procedures in Capital Cases and contained in § 107(a) of the 1996 Act, applies "to cases pending on or after the date of enactment of this Act." Section 107(c), 110 Stat. 1226. This establishes, Lindh submits, that §§ 101 to 106 of the statute do not apply to pending cases.

"Establishes" is too strong a word. Sections 101 to 106 amend Chapter 153 of Title 28. Nothing in the 1996 Act provides one way or another for the temporal extent of the changes. Do they govern collateral attacks arising out of crimes committed after April 24, 1996? Convictions after that date? Appellate decisions after that date? Collateral attacks filed after that date? The statute is silent. Congress addressed those issues for Chapter 154, but not Chapter 153. There is at most a negative implication. Should we draw it? A competing inference is that Congress could not agree on an effective-date provision for the amendments to Chapter 153, leaving the subject to judicial resolution. Perhaps instead Congress overlooked the subject when drafting §§ 101-106 (the changes to Chapter 153 and the new Chapter 154 originated in different Houses of Congress at different times)--or recognized its importance but thought the answer so clear that express provision was unnecessary. Which understanding is superior?

Potential negative implications of effective-date provisions have been urged before, most recently in Landgraf. The Civil Rights Act of 1991 provides that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." The Court held that this language "does not even arguably suggest that [the Act] has any application to conduct that occurred at an earlier date." 114 S.Ct. at 1493 (emphasis added). Two other provisions of the 1991 Act are more explicit. One says that the statute does not apply to a particular ongoing case; the other says that the extension of the civil rights laws to overseas employers "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Landgraf argued that these two anti-retroactivity provisions established that the rest of the 1991 Act applied to conduct preceding its enactment. Otherwise the two anti-retroactivity provisions would be irrelevant, and courts try to interpret laws to avoid both irrelevance and redundancy. Landgraf, 114 S.Ct. at 1494. The Court conceded this but held nonetheless that the 1991 Act is effectively silent on the question. Id. at 1494-96. It was unwilling to draw a negative implication from two provisions that may have been inserted just to make double sure. Although "a majority of the 1991 Congress [may have] favored retroactive application, even the will of the majority does not become law unless it follows the path charted in Article I, § 7, cl. 2 of the Constitution" (114 S.Ct. at 1496)--that is, unless it yields a text agreed on by both Houses and signed by the President.

*4 Just so with the 1996 Act. And the argument by negative implication is weaker for the 1996 Act than for the 1991 Act. The Supreme Court's holding in Landgraf made two sections of the statute irrelevant. Nothing we could hold, one way or the other, about §§ 101-106 could deprive § 107(c) of independent meaning. True enough, 28 U.S.C. § 2264(b), in Chapter 154, refers to § 2254(d), so § 107(c) requires the application of the amended § 2254(d) to capital cases within the scope of Chapter 154. But we think that Lindh misunderstands Chapter 154 when contending that § 2264(b) has "no function other than to cause certain of the otherwise inapplicable Chapter 153 revisions to apply retroactively" (Supp. Reply Br. 3). Section 2264(a) provides that, when Chapter 154 applies, a court shall consider only "a claim or claims that have been raised and decided on the merits in the State courts" unless failure to raise a claim was caused by one of three identified circumstances. Section 2264(b) adds: "Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it." Why only "subsections (a), (d), and (e) of section 2254"? Surely not because these are to be retroactive, while subsections (b), (c), (f), (g), (h), and (i) are not. If as Lindh believes the only reason to include § 2254(d) in § 2264(b) is to apply it to pending cases, then this must also be the sole reason for referring to § 2254(a)--but § 2254(a) is not amended by the 1996 Act, while many subsections omitted from the list in § 2264(b) were amended or added by the new statute.

Section 2264(b) conveys its meaning only when read together with § 2264(a). Subsections (b) and (c) of § 2254 have been omitted from the list because § 2264(a) replaces their rule with one more favorable to the states. Section 2254(b) and (c) codify the

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exhaustion requirement, which § 2264(a) displaces for Chapter 154 cases. The remaining subsections of § 2254 likewise don't fit the Chapter 154 scheme. For example, § 2254(i), added by the 1996 Act, says that "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 110 Stat. 1219. Chapter 154 addresses this question directly in the new 28 U.S.C. § 2261(e), 110 Stat. 1222, making incorporation of § 2254(i) inapt. Section 2264(b) tells us not "when," but "which." Lindh's argument therefore misses the mark: this section neither addresses any other section's temporal effectiveness nor is made irrelevant by applying § 2254(d) to pending cases.

Chapter 154 comprises many rules that Congress evidently wanted to apply forthwith no matter what the courts made of §§ 101-106. For example, the new 28 U.S.C. § 2262(a) provides for automatic stays of execution during initial collateral attacks covered by Chapter 154. Prisoners on death row received stays on April 24, 1996, even if courts had denied stays under prior law. Having blocked executions while litigation continues, Congress curtailed the time federal courts may take to act--for example, a court of appeals must decide a capital appeal within 120 days after the filing of the reply brief. 28 U.S.C. § 2266(c)(1)(A). Section 107(c) applies that limit to pending capital cases, a step that serves quite a different function from a decision one way or the other about the application of § 2254(d) to non-capital cases. Congress obviously wanted to ensure that both the stays of execution and the time limits--provisions of Chapter 154 without counterparts in Chapter 153-- extended to as many cases as possible. Nothing about that decision has any implications for Chapter 153. We conclude that § 107(c) does not govern the question at hand. Sections 101-106 lack an effective-date provision. We must decide what to do when the legislation is silent.

B

*5 Landgraf reiterates two long-established rules that govern when the legislature is silent: first, courts normally apply the law in force at the time of decision; second, the court does not use the new law if application would be "retroactive." Each side appeals to one of these propositions. Wisconsin contends that § 2254(d) is today's rule of decision and should be applied. Lindh rejoins that § 2254(d) would be "retroactive" to the extent it reduces his chance of prevailing. He also contends that he is entitled to a writ of habeas corpus whether or not § 2254(d) applies, but he uses the possibility of an adverse effect as the definition of retroactivity. As a definition, it will not do--for it would obliterate the first rule, turning it into something like "a court applies the law in force at the time of its decision whenever it is the same as the law in force all along." Landgraf was explicit that "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct". 114 S.Ct. at 1499 n. 24; see also id. at 1501-04.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf, 114 S.Ct. at 1499 (citation and footnote omitted). Section 2254(d) does not attach new legal consequences to the filing of petitions for habeas corpus, although some other parts of the 1996 Act may do this. We take it that under Landgraf a certificate of probable cause to appeal issued before April 24, 1996, authorizes an appeal, although after April 24 appeal depends on a "certificate of appealability" under § 102 of the 1996 Act (amending 28 U.S.C. § 2253(c)), which not only changes the name but also requires the court to identify the appealable issue. Similarly, a second or successive petition already pending on April 24 does not require prior approval of the court of appeals under § 106 (amending 28 U.S.C. § 2244(b)), see Williams v. Calderon, 83 F.3d 281, 285-86 (9th Cir.1996), although the application of the substantive standards in the new § 2244(b) to determine who is eligible for relief is a more difficult question, which the

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court addresses separately today in Burris v. Parke, No. 95-3725.

For a provision such as § 2254(d), which affects the relation between federal and state courts, rather than regulating the details of litigation, the date on which the petition was filed can't be any more important than the date on which the suits were filed in Landgraf and Mojica v. Gannett Co., 7 F.3d 552 (7th Cir.1993) (en banc). In Landgraf the Court asked whether the Civil Rights Act of 1991 could be applied to employment decisions that preceded the statute. A lawsuit concerning 1990 conduct is governed by 1990 law, no matter when the suit began, Landgraf held (as we had held in Mojica, 7 F.3d at 558-59). See also Rivers v. Roadway Express, Inc., 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). The parallel question is whether the 1996 Act may be applied when the crime or state court decision preceded April 24, 1996.

*6 Understandably, Lindh does not argue that, when deciding whether to commit a crime (and, if so, which one), he relied on the availability of the version of § 2254 that was on the books in 1988. Under the Ex Post Facto clauses people charged with crime have powerful, and enforceable, expectations about the legal rules that apply to their conduct. But the 1996 Act does not change any of the rules defining or penalizing crime. Moreover, having lost in the state's judicial system before the amendment, Lindh cannot successfully argue that the change of law affected the judicial process. By any standards, the former version of § 2254 was more favorable to prisoners than the current one, and the prospect of more intensive review by federal courts may have made state courts more attentive to claims under federal law. Lindh wants us to cast a darker light on state judges--to assume that the prospect of plenary federal review made them inattentive to federal rights, because then they could appear tough on crime (to improve reelection prospects) while knowing that the people they confine in prison would eventually be let go. He does not offer any empirical support for believing that state judges wrongfully imprison people to further their own careers, and in Wisconsin judges who proclaim willingness to give defendants extra rights have had no difficulty being retained. See Shirley S. Abrahamson, The Emergence of State Constitutional Law, 63 Tex.L.Rev. 1141 (1985). It would not be appropriate to presume that the Justices of the Supreme Court of Wisconsin treated Lindh poorly because they anticipated independent federal review.

Section 2254(d) does not regulate primary conduct. Instead it makes the initial judgment more stable. Do prisoners have legitimate expectations about the scope of collateral review? This is a question the Supreme Court addressed in Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). A prisoner called his lawyer ineffective for failing to take full advantage of an appellate opinion that was overruled after the prisoner commenced his collateral attack. The Supreme Court held that the prisoner could not rely on the overruled decision (or obtain relief because his lawyer failed to do so, when he could), even though its disappearance reversed the outcome of his case. The Court's discussion is worth quoting:

> The dissent contends that this holding is inconsistent with the retroactivity rule announced in Teague v. Lane, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), but we think otherwise. Teague stands for the proposition that new constitutional rules of criminal procedure will not be announced or applied on collateral review. As the dissent acknowledges, this retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on "the constitutional standards that prevailed at the time the original proceedings took place." "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Butler v. McKellar, 494 U.S. 407, 414, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990).

*7 A federal habeas petitioner has no interest in the finality of the state court judgment under which he is incarcerated: indeed, the

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very purpose of his habeas petition is to overturn that judgment. Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions that corresponds to the State's interest described in the quotation from Butler, supra. The result of these differences is that the State will benefit from our Teague decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of Teague to the circumstances which gave rise to it. Cessante ratione legis, cessat et ipsa lex. 506 U.S. at 372-73 (citations omitted). In other words, legal changes that reduce the willingness of federal courts to set aside judgments presumptively apply to existing judgments.

This is the historical practice. The Supreme Court consistently applies statutory changes in the law of collateral attack to pending cases, and perforce to newly filed cases that seek relief from judgments entered before the statute's enactment. In Felker v. Turpin, --- U.S. ----, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), the Court decided a case under the 1996 Act's standards, even though the conviction preceded the amendments. (The petition for habeas corpus in Felker was filed after April 24, 1996, but we have already explained why the date of the petition cannot be dispositive.) Thirty years ago Congress made extensive amendments to Chapter 153, which the Court applied to cases under review without so much as remarking on the date of enactment. Smith v. Yeager, 393 U.S. 122, 124-25, 89 S.Ct. 277, 21 L.Ed.2d 246 (1968); Carafas v. LaVallee, 391 U.S. 234, 239, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). Earlier amendments to the rules of collateral attack likewise were brought to bear in pending cases. Gusik v. Schilder, 340 U.S. 128, 131-33 & n. 4, 71 S.Ct. 149, 95 L.Ed. 146 (1950), implements the exhaustion requirement introduced by the 1948 amendment to § 2254. Accord, Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950).

The language of the amendments likewise implies immediate application. Recall that § 2254(d) does not empower a court to issue the writ. Instead it forbids issuance of the writ--the application "shall not be granted unless" certain conditions have been met. The prohibition is prospective: a court must not issue the writ tomorrow, unless.... The difference between an authorization and a prohibition is one we must respect. See Ivey v. Harney, 47 F.3d 181 (7th Cir.1995). It is the sort of difference that the Supreme Court has relied on when holding that changes in the law affecting judicial ability to supply prospective relief govern pending cases. E.g., Hall v. Beals, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969); American Steel Foundries v. Tri- City Central Trades Council, 257 U.S. 184, 201-02, 42 S.Ct. 72, 66 L.Ed. 189 (1921); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 464, 41 S.Ct. 172, 65 L.Ed. 349 (1921), all discussed favorably in Landgraf, 114 S.Ct. at 1501. Current law normally governs when statutes "speak to the power of the court rather than to the rights or obligations of the parties," Republic National Bank of Miami v. United States, 506 U.S. 80, 99-100, 113 S.Ct. 554, 121 L.Ed.2d 474 (1992) (Thomas, J., concurring) (quoted with approval in Landgraf, 114 S.Ct. at 1499, 1502). We do not suggest that § 2254(d) reduces the power of the court in the sense of subject-matter jurisdiction, which survives intact in 28 U.S.C. § 2241; a state may waive the benefits of § 2254(d), although other provisions of the 1996 Act, such as the revised exhaustion requirement in § 2254(b), suggest that counsel's inattention to the niceties of federal practice does not forfeit the benefits the law bestows on the state as an entity. See also Eaglin v. Welborn, 57 F.3d 496, 498-99 (7th Cir.1995) (en banc) (holding that a court may decide a case on the basis of Teague even if the state's lawyers overlooked that possibility). Our point, rather, is that the amended § 2254(d) is designed to curtail collateral review and augment the finality of judgments, which strongly implies application to existing judgments.

C

*8 Lindh and the State of Wisconsin litigated in the state's forums the constitutional claim

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he presents to us. To leave the ensuing judgment in force--and to leave all of the rules governing primary conduct intact--is not "retroactive" in the sense Landgraf uses that term, and the amended § 2254(d) is therefore presumptively applicable. We respectfully disagree with the contrary conclusions of Edens v. Hannigan, 87 F.3d 1109, 1111 n. 1 (10th Cir.1996), and Boria v. Keane, 90 F.3d 36 (2d Cir.1996).

There remains a possibility that application of the 1996 Act could "attach new legal consequences" to events other than the crime and the state's legal processes and judgment. Consider, for example, how the filing deadline in § 101 of the 1996 Act applies to existing judgments. Under the new statute, 28 U.S.C. § 2244(d), a petitioner has only one year from the completion of direct review to commence a collateral attack; there was no corresponding limit in prior law, although Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts established an amorphous standard linked to prejudice to the state. A prisoner could wait a decade without transgressing Rule 9(a). See Lonchar v. Thomas, --- U.S. ----, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996). Lindh got his collateral attack under way less than a year after the Supreme Court of Wisconsin decided his case. But suppose he had waited two years, filing in 1993 rather than 1992. Would we now apply § 2244(d) and dismiss the petition? Not at all. A prisoner's decision to defer filing--perhaps while doing legal research, or while waiting for the Supreme Court to decide a case that could influence the selection of issues--is the sort of event to which the amended statute would "attach new legal consequences." Courts treat a reduction in the statute of limitations as a rule for new cases only. See Landgraf, 114 S.Ct. at 1502 n. 29. And although no decision of the Supreme Court addresses the question directly, we do not doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway. A new statute is unlike a judicial construction of an existing statute, which after Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), and James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), governs all pending cases. Section 2244(d) is short enough that the "reasonable time" after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d) and the parallel provision added to 28 U.S.C. § 2255 by § 105 of the 1996 Act.

But Lindh lacks any reliance interest nearly that strong. His able counsel identifies only two steps he took (rather, omitted) in supposed reliance on the prior state of the law: he did not ask the Supreme Court of the United States to review the decision of the Supreme Court of Wisconsin, and he did not file a collateral attack in state court. Let us start with the omission of a petition for certiorari. Lindh observes that the Supreme Court, engaged in direct review under 28 U.S.C. § 1257, would not have been (and still is not) affected by § 2254(d). That is true enough, but even under the former text of § 2254 petitioners faced obstacles (such as the exhaustion requirement, the special protection of state courts' findings of fact, and the Teague doctrine) that did not apply on direct review under § 1257. A court exercising appellate jurisdiction has now, and had in 1991, more authority to correct errors than a court hearing a collateral attack. Defendants in state cases bypass their opportunity to seek certiorari not because they expect favorable treatment under § 2254, but because they recognize that the Supreme Court of the United States rarely grants such requests. "A petition for a writ of certiorari will be granted only for compelling reasons." S.Ct. R. 10. As a practical matter, to obtain direct review Lindh would have had to establish not only the national importance of the question at hand, but also that the decision of the Supreme Court of Wisconsin interpreted the Constitution in a way disagreeing with the interpretation of the highest court of another state, or of a United States court of appeals. S.Ct. R. 10(b). Lindh does not argue that his case presents such an abstract legal question; instead he argues that the state's courts

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misapplied settled law to the facts of his case. Such a contention had no prospect in 1991 of receiving an audience in the Supreme Court of the United States, and Lindh gave up nothing of value by deciding not to seek certiorari. Lightning can strike a petition for certiorari, but Lindh's would not have been a good lightning rod.

*9 As for the omission of a collateral attack in state court: Wisconsin would not have entertained one, had Lindh filed it. Wisconsin does not permit an inferior court to review a decision of the state's highest court. Wis. Stat. § 974.06. A prisoner who can establish an unusual reason, such as an intervening change of law, may wage a collateral attack in Wisconsin even after the state's Supreme Court has addressed the merits, see State v. Escalona-Naranjo, 185 Wis.2d 168, 517 N.W.2d 157 (1994), but Lindh does not qualify for this exception--and, if he does, the state courts remain open to him. Lindh contends that the Supreme Court of Wisconsin misunderstood one factual question: whether Roberts' privileges at the University of Wisconsin Hospital had been suspended by the time of trial. The court wrote that the record did not show such a suspension, 468 N.W.2d at 173, and Lindh says that this is wrong. If so, and if this is important, Lindh could have sought rehearing in the state court or could have introduced factual support for his position in the federal district court. He did neither, raising this contention for the first time only in supplemental briefs filed after the case had been set for rehearing en banc. Issues raised so belatedly are forfeited; we deny the motion to supplement the record. Lindh's delay cannot be attributed to the 1996 Act, as he had ample opportunity to make his version of events known under both former and current § 2254 (the amended § 2254(e)(1), 110 Stat. 1219, authorizes a petitioner to dispute a factual determination by a state court, although proof of error requires clear and convincing evidence). Once again, therefore, Lindh's litigating decisions were not affected by the difference between the versions of § 2254. The 1996 Act does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 114 S.Ct. at 1505. The new law therefore governs our consideration of Lindh's contentions.

D

Almost as an afterthought, Lindh (with the support of the American Bar Association, as amicus curiae) asserts that any alteration in the scope of collateral review after a prisoner has filed a petition under § 2254 violates Art. I, § 9, cl. 2 of the Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Lindh does not cite any authority for this proposition, and we think the contention feckless. If the new § 2254(d) "suspends" the Great Writ, it does so no less for cases filed on April 25, 1996, than for cases pending on April 24. Yet to alter the standards on which writs issue is not to "suspend" the privilege of the writ. Felker so holds for another amendment made by the 1996 Act.

*10 The writ known in 1789 was the pre-trial contest to the executive's power to hold a person captive, the device that prevents arbitrary detention without trial. Ex parte Bollman & Swartwout, 8 U.S. (4 Cranch) 75, 2 L.Ed. 554 (1807); Ex parte McCardle, 73 U.S. (6 Wall.) 318, 18 L.Ed. 816 (1868); Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886). See McCleskey v. Zant, 499 U.S. 467, 478, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); Schlup v. Delo, --- U.S. ----, ----, 115 S.Ct. 851, 862, 130 L.Ed.2d 808 (1995). The power thus enshrined did not include the ability to reexamine judgments rendered by courts possessing jurisdiction. Ex parte Kearney, 20 U.S. (7 Wheat.) 38, 5 L.Ed. 391 (1822); see also Dallin H. Oaks, Habeas Corpus in the States--1776-1865, 32 U. Chi. L.Rev. 243, 244-45 (1965). Under the original practice, "a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal ... [and] prevented issuance of a writ". United States v. Hayman, 342 U.S. 205, 211, 72 S.Ct. 263, 96 L.Ed. 232 (1952); see also Ex parte Yerger, 75 U.S. (8 Wall.) 85, 101, 19 L.Ed. 332 (1869).

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The founding-era historical evidence suggests a prevailing view that state courts were adequate fora for protecting federal rights. See Max Farrand, 1 Records of the Federal Convention of 1787 124-25 (1937). Based on this assumption, there was (and is) no constitutionally enshrined right to mount a collateral attack on a state court's judgment in the inferior Article III courts and, a fortiori, no mandate that state court judgments embracing questionable (or even erroneous) interpretations of the federal Constitution be reviewed by the inferior Article III courts.

Collateral review of judgments accordingly is subject to legislative control, as the first Congress, dominated by those who wrote and ratified the Constitution, recognized. See Ex parte Watkins, 28 U.S. (3 Pet.) 193, 7 L.Ed. 650 (1830). Section 14 of Judiciary Act of 1789 prohibited any inquiry by the federal courts into the propriety of state custody. 1 Stat. 82; see Ex parte Dorr, 44 U.S. (3 How.) 103, 11 L.Ed. 514 (1845). Congress first created a general power of collateral review in 1867, 14 Stat. 385, and then repealed it the next year, 15 Stat. 44, a step sustained in McCardle. (Limited powers created in 1833, 4 Stat. 634-35, to protect federal officers from state interference, and in 1842, 5 Stat. 53940, to protect foreign nationals, did not affect the bulk of criminal cases.) The general power was not reestablished until 1885, 23 Stat. 437, and has been subject to frequent revision by Congress--and reinterpretation by the Supreme Court--ever since. Collateral review of judgments entered after full opportunity for litigation is the work of the 20th Century. Whether the first occasion came in 1953 with Brown v. Allen, or that honor belongs instead to Waley v. Johnson, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942), or even Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915), which stretched the rule that a writ may issue when the convicting court lacks "jurisdiction" (see Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1874)), does not matter. Justices debated the question in Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), as a matter of statutory interpretation. "Judgments about the proper scope of the writ are 'normally for Congress to make.' " Felker, --- U.S. at ----, 116 S.Ct. at 2340, quoting from Lonchar, --- U.S. at ----, 116 S.Ct. at 1298. Any suggestion that the Suspension Clause forbids every contraction of the powers bestowed by Congress in 1885, and expanded by the 1948 and 1966 amendments to § 2254, is untenable. The Suspension Clause is not a ratchet.

II

*11 Section 2254(d)(1) provides that a writ may not issue unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". What does this mean? Is it congruent with the judicial role established by Article III of the Constitution? And how does it affect Lindh's contentions?

A

The Conference Report on the 1996 Act says that § 2254(d) "requires deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law." H.R.Conf.Rep. 104-518, 94th Cong., 2d Sess. 111 (1996). This passage, together with similar comments on the floor, has led to an unproductive debate among the parties and the amici about what "deference" entails. It is a wonderful illustration why legislative history so often misleads--for the word "deference" does not appear in the statute. It does not tell us to "defer" to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), depends on delegation. See Adams Fruit Co. v. Barrett, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). Congress did not delegate either interpretive or executive power to the state courts. They exercise powers under their domestic law, constrained by the Constitution of the United States. "Deference" to the jurisdictions bound by

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those constraints is not sensible. We see no need to pursue this subject, however, because our task is to construe the enacted statute, not to construe its legislative history.

The first phrase of § 2254(d)(1)--authorizing a federal court to issue the writ when the state court's decision is "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States", preserves rather than undermines federal courts' independent interpretive power. Federal courts are free to express an independent opinion on all legal issues in the case. So if, for example, the Supreme Court of Wisconsin had held that the Confrontation Clause does not entitle defendants to cross-examine witnesses to establish bias, then Davis v. Alaska would show that the decision is "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States", even if decent arguments could be constructed that Davis misunderstood the Confrontation Clause. Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law "as determined by the Supreme Court of the United States" that prevails.

*12 This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty in this portion of § 2254(d)(1) is not the "contrary to" part but the reference to "Federal law, as determined by the Supreme Court of the United States" (emphasis added). This extends the principle of Teague by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ. It does not, however, purport to limit the federal courts' independent interpretive authority with respect to federal questions.

An application for a writ is only an invitation to a federal court to grant the requested relief upon its review of a criminal conviction and confinement under state law. See Felker, --- U.S. at ----, 116 S.Ct. at 2339. The authority to issue the writ is conferred on courts by statute. Ex parte Bollman & Swartwout, supra. It is doctrinally distinct from the statutory grant of jurisdiction to decide a case or controversy, e.g., 28 U.S.C. § 1331. Yet just as Congress may restrict the jurisdiction of the inferior Article III courts, so it may prescribe limits on the granting of the extraordinary relief provided by the writ of habeas corpus.

A conflict between decisions of the Seventh Circuit and the Supreme Court of Wisconsin would not authorize issuance of a writ under § 2254(d)(1). State courts must knuckle under to decisions of the Supreme Court, but not of this court. So Lindh must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. He has Davis and Van Arsdall. We therefore need not shoulder the potentially difficult task of determining when an appellate gloss on a decision of the Supreme Court has so far departed from its wellsprings as to be the "real" source of law, or when the chain of reasoning has stretched so long that the rule cannot be called "clearly established" as of the time the state court rendered its decision. These are the sorts of questions presented by the Teague standard, e.g., Gray v. Netherland, --- U.S. ----, ---- - ----, 116 S.Ct. 2074, 2083-85, 135 L.Ed.2d 457 (1996); Sawyer v. Smith, 497 U.S. 227, 236, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990); Saffle v. Parks, 494 U.S. 484, 488, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) ("compelled by existing precedent"), and the "clearly established" language is unlikely to pose a different kind of interpretive challenge.

The new § 2254(d)(1) adds a twist to the complexities of the Teague inquiry, however, because it explicitly identifies only the Supreme Court as the font of "clearly established" rules. This language could be understood to adopt an unfortunate view that applies the unitary model of the executive department to the judicial department as well. Such a view of the judiciary, which runs counter to the explicit textual differences between the vesting clauses of Articles II and III, assigns to the inferior Article III courts a role analogous to that of an executive agency. From this flawed perspective, the inferior

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courts are seen as agencies of the judicial department with authority derived from the power vested in the Supreme Court.

*13 The Constitution vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III § 1. The vesting clause of Article III is quite different from the vesting clause of Article II, which says that the "executive Power shall be vested in a President of the United States of America." Art. II § 1 cl. 1. By virtue of the grant in Article II to a single person, agencies of the executive department exercise executive authority on behalf of the President. See Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

In contrast, the judicial power is given by the Constitution to each of the inferior Article III courts. Accordingly, when these courts act within their jurisdictions, they exercise the judicial power directly, though subject to the limits of revisionary jurisdiction of a court superior within the Article III hierarchy. The inferior courts do not rely on the Supreme Court for their authority to exercise the judicial power, for this power is given them directly by Article III once they are ordained, established, and provided with jurisdiction by Congress.

Lindh would like us to stop here, to announce that § 2254(d) has not changed the law in any way material to his case, and to proceed to decision. We cannot do that, because one ingredient of Lindh's claim is not well established. The Confrontation Clause (and therefore the principles of Davis and Van Arsdall) governs at trial of the merits, but not at sentencing. Is the dispositional phase of a bifurcated trial closer to the merits, or to sentencing? We return to that question in Part II.C. Moreover, we do not read the "contrary to ..." language to authorize issuance of a writ whenever a court errs, as Lindh and the amici prefer; that would vitiate the second ("unreasonable application") clause of § 2254(d)(1). The two clauses have separate functions. We must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts--when it is, in the standard phrase, a "mixed question of law and fact"-sec. 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application of" the law.

The reference to an "unreasonable application of Federal law" sounds like the official-immunity question in constitutional-tort litigation, but we doubt that this is quite the right analogy. Principles of immunity are designed to draw the line between prospective relief and damages from a governmental body, on the one hand, and payment from the pocket of a public employee, on the other. Section 2254(d)(1) serves an entirely different function. Perhaps, then, the unreasonable-application language should be understood as another variation on Teague. Recall the quotation in Lockhart from Butler: Teague "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Section 2254(d)(1) generalizes this principle of respect by withdrawing the "later decisions" proviso.

*14 How much leeway does the "unreasonable application" language create? None on questions of interpretation. It does not authorize or permit state courts to deviate from the Constitution. Federal courts acting within their jurisdiction are always entitled to interpret the law independently. Section 2254(d)(1) as we read it does no more than regulate relief. It tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called "unreasonable." Historical practice (see Part I.D above) likewise counseled restraint in use of the writ. Other rules limiting the remedy abound. We have mentioned official immunity cases, in which federal courts retain full interpretive power, but forbear from using the remedy of damages. Consider, too, the doctrine of United States v. Leon, 468 U.S. 897 (1984), under which the exclusionary rule does not apply to evidence gathered in

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reasonable reliance on a search warrant, even if the warrant was issued in violation of the Constitution. In such cases the court retains (but need not exercise) the power to identify the state court's violation of the Fourth Amendment, see 468 U.S. at 925, but the remedy of suppression (and a new trial) is withheld unless the violation is obvious, or the officer's reliance unreasonable. The inevitable-discovery doctrine similarly specifies situations in which a constitutional violation (established by independent review in the federal courts) does not lead to the remedy of upsetting a criminal conviction. See Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

None of this answers the question when a departure is so great as to be "unreasonable," for that question lacks an abstract answer, just as courts have been unable to give precise content to phrases such as "abuse of discretion." Application of Leon therefore has required careful inquiry one case at a time, and we do not see how application of § 2254(d)(1) can be much different. For current purposes it is enough to say that when the constitutional question is a matter of degree, rather than of concrete entitlements, a "reasonable" decision by the state court must be honored. By posing the question whether the state court's treatment was "unreasonable," § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.

Questions of degree--like questions about the proper use of "discretion"--lack answers to which the labels "right" and "wrong" may be attached. When the subject is painted in shades of grey, rather than in contrasting colors, a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment. Think of the Speedy Trial Clause of the Sixth Amendment, which after Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), does not prescribe a rule for "how long is too long" but rather establishes a list of factors to consider. The Supreme Court of the United States sets the bounds of what is "reasonable"; a state decision within those limits must be respected--not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions. That is the principal change effected by § 2254(d)(1).

B

*15 The American Bar Association and a group of former federal judges, appearing as amici curiae, contend that § 2254(d)(1) is unconstitutional to the extent it requires anything less than plenary review of all contentions based on federal law. Their argument, distinct from Lindh's invocation of the Suspension Clause, is that the "judicial Power of the United States" (Art. III § 1) is the power to interpret the law independently. They rely on Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is") and modern statements such as Plaut v. Spendthrift Farm, Inc., -- U.S. ----, ----, 115 S.Ct. 1447, 1453, 131 L.Ed.2d 328 (1995), and Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2234 (1995).

If by this line of argument the amici mean that federal courts must give judgment without regard to the legal views of other public actors, and without regard to the resolution of contested issues in state litigation, then their argument reaches far beyond § 2254(d). It would mean that deference in administrative law under Chevron is unconstitutional; that the respect accorded to Congress when it speaks on constitutional questions (e.g., Wisconsin v. New York City, -- U.S. ----, ---- - ----, 116 S.Ct. 1091, 1100-01, 134 L.Ed.2d 167 (1996); Weiss v. United States, 510 U.S. 163, 177, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994); Donovan v. Dewey, 452 U.S. 594, 603, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); United States v. Watson, 423 U.S. 411, 416, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)), must be abandoned; and that the Full Faith and Credit Clause (Art. IV § 1) conflicts with Article III. This position would demolish

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numerous doctrines in the law of collateral attack that no one (until now) has supposed pose constitutional difficulties.

Consider Stone v. Powell, 428 U.S. 465, 482, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), which holds that when a "State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at the trial." Stone contemplates--indeed it requires--that a federal court refrain from issuing a writ under § 2254 even though the court is convinced that the state judges erred on the law, and even though the error altered the outcome of the case. On several occasions the Supreme Court has treated Stone as a doctrine that on grounds of prudence could be extended to other subjects (although the Court has not so extended it). See Reed v. Farley, 512 U.S. 339, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) (claims under the Interstate Agreement on Detainers); Withrow v. Williams, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (claims based on Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). If the Court could adopt Stone and consider extending its scope, creating a gap between the "merits" and the obligation to issue a writ, then Congress may do the same by amending § 2254.

*16 Teague likewise establishes a disjunction between the meaning of the Constitution and the use of habeas corpus. If a state judgment becomes final in 1992, and the Supreme Court articulates a new rule of constitutional law in 1993, then a petition for collateral review in 1994 will fail--not because the state court was "right" on the merits, but because some errors of constitutional law do not support collateral relief. Section 2254(d)(1) codifies and extends the principle of Teague, and if Teague is consistent with Article III, then so is § 2254(d)(1) as we have construed it.

The amici curiae neglect a basic distinction that Plaut recognizes: Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases. See -- U.S. at ---- - ----, 115 S.Ct. at 1452- 53; see also Robertson v. Seattle Audubon Society, 503 U.S. 429, 441, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992). Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck, but it may prescribe maximum damages for categories of cases, Carter v. United States, 983 F.2d 1141 (7th Cir.1992), or provide that victims of torts by federal employees cannot receive punitive damages, see 28 U.S.C. § 2674. It may establish that if the driver was acting within the scope of his employment, the United States must be substituted as a party and the driver dismissed--even if that turns out to deprive the victim of compensation. See United States v. Smith, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). Even for claims based on the Constitution, there may be rights without remedies. FDIC v. Meyer, 510 U.S. 471, 114 S.Ct. 996, 1005-06, 127 L.Ed.2d 308 (1994); Schweiker v. Chilicky, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983); Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). So too with § 2254(d)(1). Congress lacks power to revise the meaning of the Constitution or to require federal judges to "defer" to the interpretations reached by state courts. Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired. Regulating relief is a far cry from limiting the interpretive power of the courts, however, and Congress has ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed.

This distinction between rights and remedies is fundamental. Every day, courts decline to disturb judgments that they know are wrong. This is the principal function of the law of judgments. Suppose A and B are plaintiffs in the same lawsuit, which they lose; A appeals and wins, while B does not appeal. It has now been established that the judgment against B is wrong. May B file a new suit to obtain the

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benefit of A's victory? The answer is "no." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The Full Faith and Credit Clause is designed to make this result a matter of constitutional entitlement. And although today we think of claim preclusion (res judicata) as a specialty of civil law, it is only in this century that courts have treated civil and criminal judgments differently. Recall the discussion in Part I.D above. See also Felker, --- U.S. at ----, 116 S.Ct. at 2340; Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 465-99 (1963) (tracing the history).

*17 In suits under 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), courts frequently rule for the defendant even though the plaintiff may be right on the merits. Public employees receive the benefit of the doubt on legal questions and must pay damages only when the legal right has been sufficiently well established and particularized that a reasonable official would have understood that what he is doing violates that right. See Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); Auriemma v. Rice, 910 F.2d 1449 (7th Cir.1990) (en banc). Section 2254(d)(1) creates a related approach and is no less consistent with Article III. Even in criminal cases, courts sometimes enforce decisions they would not have made in the first instance. Stone, Teague, Leon, Nix, and the harmless-error cases, e.g., Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), are among many illustrations of the gap between having a good legal argument and winning release from custody. X and Y are indicted for a joint crime. X pleads guilty; Y pleads double jeopardy and wins, whereupon X claims that his sentence is illegal and asks for relief. United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), holds that X must serve his sentence, because the plea of guilty waives even arguments that in retrospect are known to be correct.

Section 2254(d)(1)'s requirement that judges apply "Federal law, as determined by the Supreme Court of the United States", rather than their own understanding of the law, is consistent with the hierarchical nature of the federal judiciary. Judges of the inferior courts must implement the views of their superiors, from which it follows that many decisions of the lower courts will be inconsistent with the conclusions their judges would have reached, if unfettered by precedent. Applying, even predicting, the work of other judges, rather than reaching independent conclusions, makes up the bulk of the work of a federal judge--not only when interpreting the decisions of the Supreme Court, but also when deciding cases under the diversity jurisdiction, see Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and when coping with federal law that is not uniform geographically, see Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1126-27 (7th Cir.1993); Olcott v. Delaware Flood Co., 76 F.3d 1538, 1544-48 (10th Cir.1996). See also Lehman Brothers v. Schein, 416 U.S. 386, 390-91, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 17A Federal Practice and Procedure § 4248 (2d ed. 1988), discussing a circumstance under which a state court's decision is directly binding in federal litigation: the certification of a question of law to a state court. Article III does not establish a system under which judges of the inferior federal courts always must render judgment without regard to the conclusions of other courts.

*18 Shortly before Brown v. Allen changed the rules, Learned Hand could write with confidence that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability,

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they have accorded to an accused his constitutional rights. Schechtman v. Foster, 172 F.2d 339, 341 (2d Cir.1949). This expression of the longstanding distinction between unlawful custody, which supported a writ of habeas corpus, and unlawful procedure in the course of a trial, which did not, reflected the law of the United States until 1953. Congress has elected to move back in that direction--but hardly very far, preserving independent federal review on pure questions of law, and subjecting mixed questions of law and fact to review for reasonableness. We would have to cast history to the winds to say that this decision, which respects fully-litigated judgments unless the state court has gone seriously wrong, transgresses constitutional limitations.

The American Bar Association's further argument (which Lindh joins) that the Due Process Clause of the Fifth Amendment protects § 2254 from amendment is unpersuasive. The ABA contends that because federal "courts traditionally have conducted a plenary review of [state] courts' ruling[s] on legal issues", the entitlement to such a review has become a "fundamental right" protected by the substantive component of due process analysis. To establish this "traditional" role, the ABA cites no case before Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935), a decision that is hardly pertinent. (Norris was not a collateral attack but arose on certiorari to a state court under what is now § 1257.) The summary of collateral review in Part I.D of this opinion, and Learned Hand's assessment of the state of the law in 1949, should disabuse any observer of the belief that plenary federal review of state criminal judgments is so firmly rooted in American tradition that any alteration has passed beyond legislative power. The Constitution contains an express limit on the power of Congress over the writ of habeas corpus--the Suspension Clause. It is not an appropriate exercise of the "judicial Power" to supplement the Suspension Clause with a rule that enhancements of the 20th Century cannot be altered.

C

At last we reach Lindh's arguments about the restrictions the trial judge placed on his lawyer's cross-examination of Dr. Roberts. Lindh insists that he was entitled to cross-examine Roberts about the allegations of sexual misconduct in order to show, if not actual bias, a reason Roberts may have had to make his assessment more favorable to the prosecutor. Wisconsin replies with two arguments: first, that the decision is not "contrary to ... clearly established Federal law" because the Supreme Court has never held that witnesses during the dispositional phase of bifurcated trials are subject to cross-examination; second, that if the Confrontation Clause applies, the decision to limit cross examination was not "an unreasonable application of" federal law, because under the Confrontation Clause "trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 679.

*19 Lindh rejoins that the first of these arguments is untenable because the Supreme Court of Wisconsin did not decide the case on that ground. Recall that the amended § 2254(d) begins by saying that a petition must not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings" unless subsection (1) or (2) authorizes that step. Because the Supreme Court of Wisconsin addressed only the propriety of restricting the scope of cross-examination, it did not adjudicate on the merits the state's "claim" about the scope of the confrontation right. Lindh has this backwards. Wisconsin is not making any "claim" based on the Confrontation Clause. It is defending against Lindh's claim that the Confrontation Clause entitled him to cross-examine Roberts about the criminal investigation of the sexual-misconduct allegations. To prevail on this contention, Lindh must establish two propositions: that the Confrontation Clause applies at the dispositional phase of a bifurcated trial, and that the limitations on cross-examination were

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excessive. The Supreme Court of Wisconsin resolved this claim adversely to Lindh on the merits, by deciding the second proposition against him. Nothing in § 2254(d) calls on state courts to fill their opinions with discussions that by their lights are unnecessary, as the price of avoiding de novo review in federal court. There is a fundamental difference in federal practice between a "claim" and a legal theory. A "claim" is a demand for relief from an identified injury, which may be supported (or defeated) by many different theories. See Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 807-10, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988); Herrmann v. Cencom Cable Associates, Inc., 999 F.2d 223 (7th Cir.1993). The injury here is the restriction of cross-examination; the relief, a new trial. That claim has been resolved on the merits.

Lindh's contrary position would have especially unfortunate consequences when state law leads a state court to bypass a particular legal theory. Suppose Wisconsin decides as a matter of its domestic law to extend the right of cross- examination to sentencing. A defendant then contends that he is entitled to cross-examine a given witness to uncover bias; the state's highest court disagrees on the ground that the potential for bias is too remote to justify what might be a lengthy line of questioning. If the defendant then seeks a writ of habeas corpus, a state should be entitled to reply that there is no "clearly established Federal law" creating any right of cross-examination in non-capital sentencing--indeed, that it is clearly established that there is none, see Williams v. Oklahoma, 358 U.S. 576, 584, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959); Williams v. New York, 337 U.S. 241, 249-50, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); United States v. Wise, 976 F.2d 393, 397 (8th Cir.1992) (en banc)--and that the state court's decision therefore cannot be "contrary to ... clearly established Federal law". By Lindh's argument this response is impermissible, which could transmute a rule of state law (the extension of cross-examination to sentencing) into a rule of constitutional law, at least for purposes of that case. Yet one well established rule, not altered by the amendments, is that "[a] federal court may not issue the writ on the basis of a perceived error of state law." Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). See also, e.g., Gilmore v. Taylor, 508 U.S. 333, 342, 344, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993); Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Smith v. Phillips, 455 U.S. 209, 221, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). If the Confrontation Clause does not apply to a particular proceeding, then a mistaken restriction on the scope of cross-examination is nothing but an error of state law (which is how Justice Abrahamson's dissenting opinion approached Lindh's arguments). We therefore conclude that Wisconsin is entitled to make both of its arguments, and we turn to the first.

*20 Starting from the premise that the Confrontation Clause is inapplicable to sentencing, Wisconsin contends that the dispositional phase of a bifurcated trial is more like sentencing than it is like the trial of the merits. At the first phase of Lindh's trial, the jury determined that he deliberately killed two people and tried to kill a third; he pleaded guilty to two other crimes. Having established all elements of the crimes beyond a reasonable doubt, Wisconsin contends, it was entitled to treat everything that followed as a matter of what should be done with the criminal--whether to imprison him (and, if so, where and for how long) or whether to "treat" him. As the state sees things, the two Williams cases necessarily establish that a person who provides evidence relevant only to disposition is not a "witness against" the defendant for purposes of the Confrontation Clause ("[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him").

Like questions about sentencing, the consequences of an insanity finding may be removed from the jury's purview. Shannon v. United States, 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994). Because "lack of mental disease" is not an element of the crimes under state law, Wisconsin was free to decide that question by a preponderance of the evidence and even to assign the burden of persuasion to the defendant. A decision that

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Lindh was insane at the time of the shootings would not entitle him to release; it would only change the place of his confinement. The due process clause distinguishes prisons from mental institutions, see Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), but the Court held in that case that a state could choose to hold a criminal in a mental institution using the procedures for civil rather than criminal trials. And although an insanity finding would permit Lindh to seek release if he could later establish his recovery, this is not dramatically different from the opportunity to seek release from an indeterminate penal sentence on showing "rehabilitation," a feature of the federal sentencing system until the last decade and of some state systems even today. So the state submits.

Lindh does not have a decision of the Supreme Court clearly establishing that this line of argument is mistaken. Neither does he contend that the historical practice in criminal prosecutions exposed psychiatric testimony to cross- examination for bias even if the state bifurcated its proceedings. Instead he invokes a different set of analogies. If Wisconsin had established a unitary system, in which insanity was a defense on the merits (or in which sanity was an element of the offense), then Roberts plainly would have been a "witness against" him; and if a psychiatrist would have been a witness against the defendant in a unitary trial, how can bifurcation change things?, Lindh wonders. Perhaps one could respond that a chemist testifying at trial that a certain white powder is cocaine is a witness against the defendant, but the same chemist testifying at sentencing about the same subject (to determine the quantity of the drug) is not; the contradiction is built into the Supreme Court's current jurisprudence.

*21 Not prepared to concede that point, Lindh contends that Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), establishes that psychiatrists are "witnesses against" defendants even at sentencing. If that is correct, then Specht would "clearly establish" the lesser included proposition that defendants are entitled to cross-examine psychiatrists at the dispositional phase of a bifurcated trial. Specht actually stands for a different point, however: that if a state separates issues in such a way that the main trial does not establish all elements essential to imposition of the maximum punishment to which the defendant is exposed, the protections of the Confrontation Clause (and many other provisions) extend to ensuing proceedings, whether or not they are called "sentencing." Compare Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), with Schiro v. Farley, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994), and Grey v. Netherland, supra. Specht was convicted of "indecent liberties," a crime that in Colorado carried a 10-year maximum sentence. But he was sentenced under that state's Sex Offenders Act, which allowed the judge to impose an indeterminate term of one day to life on finding that the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." The Court held in Specht that psychiatric testimony bearing on these issues was subject to cross-examination because it increased the maximum punishment beyond that set by law for the crime of conviction. As a practical matter, Colorado had made it a crime, punishable by life in prison, to be a mentally ill habitual sex offender. Wisconsin has not done anything of the kind. Murder is punishable by life in prison; the elements proved beyond a reasonable doubt at the first phase of Lindh's trial therefore authorize the punishment imposed on him. The dispositional phase offered Lindh the opportunity for mitigation, quite unlike proceedings under the Sex Offenders Act in Colorado.

It may well be that, when the Supreme Court finally considers the question at issue here, it will decide that all testimony bearing on the defendant's mental state, and its effect on his punishment, comes from a "witness against" the accused, and therefore must be subject to cross-examination, no matter how the state structures the trial and sentencing process.

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But it has not yet so held, and such a conclusion would be a nontrivial extension of current law. We think it impossible to say that "clearly established Federal law, as determined by the Supreme Court of the United States", entitled Lindh to cross-examine Roberts about the allegations of sexual misconduct with patients.

Lindh therefore has to demonstrate that the state court's decision "involved an unreasonable application of, clearly established Federal law". Davis and Van Arsdall, which demonstrate that the Confrontation Clause entitles defendants to cross-examine adverse witnesses to expose their bias to the jury, are equally clear that the proper scope of cross-examination is a matter of degree. We quoted the pertinent language of Van Arsdall above. The Supreme Court of Wisconsin asked the legally correct question by inquiring whether the trial judge abused his discretion; this is exactly how Van Arsdall poses the issue. And the fact-specific answer cannot be called "unreasonable" even if it is wrong (as some members of this court who join this opinion believe). Roberts knew that prosecutors were investigating allegations made against him, but, by the time he filed his final report and testified, he also knew that the Dane County prosecutor was not in charge. He may have thought that the Milwaukee County prosecutor would reward aid to the Dane County prosecutor--but if Roberts thought that, he probably also believed that his many prior engagements as a prosecutorial expert would carry even more weight. Hindsight implies as much. The special prosecutor filed misdemeanor charges, to which Roberts pleaded guilty in January 1989. He was sentenced to probation without time in prison, and he agreed to surrender his medical license. The special prosecutor informed the sentencing judge of Roberts' many appearances as an expert witness over the course of his long career; Lindh's case was not singled out.

*22 Nothing in the record shows that Roberts altered his views between his initial interview with Lindh (before any allegations of misconduct had come to light) and his testimony at trial. The possibility that Roberts altered his views--telling the prosecutors one thing orally at the outset of the case but offering another view, less favorable to Lindh, in the written report and on the stand--was open to unfettered cross-examination. Lindh's counsel did not need to mention the sexual misconduct allegations to explore this question in depth. Under these circumstances, a reasonable and responsible judge might conclude that cross-examination based on the allegations that Roberts had sexual relations with three female patients would divert attention from the principal issue at hand--whether Lindh had a mental disease in January 1988-- without producing concrete evidence of bias. When a district judge comes to such a conclusion, a federal court of appeals will exercise deferential review, see United States v. Hernandez, 84 F.3d 931, 933-34 (7th Cir.1996), and will accord greater weight to thoughtfully reasoned decisions. Cf. United States v. Beasley, 809 F.2d 1273, 1278-79 (7th Cir.1987). Hernandez draws, for federal practice, a line similar to that of § 2254(d)(1): De novo appellate review for core legal issues, such as whether the Confrontation Clause applies, and deferential review for operational decisions within areas in which the constitutional norm allows discretion. Section 2254(d)(1) requires a federal court hearing a collateral attack to accord at least that much respect to the state courts.

The opinion of the Supreme Court of Wisconsin in Lindh's case is careful; it correctly states the holdings of Davis and Van Arsdall; it does not transgress any clearly established principles; instead it addresses a matter of degree about which thoughtful people can, and do, differ. Several portions of the opinion suggest that as a matter of state law the court was holding the trial judge to an even higher standard, which it thought satisfied. Lindh believes that the state court put too much weight on objective factors (such as whether the Dane County prosecutor could reward favorable testimony) and not enough on subjective ones (such as the possibility that Roberts credited the Dane County prosecutor with more influence than he possessed, or was willing to exercise). By restricting in the new

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§ 2254(d)(1) the scope of the extraordinary relief provided by the writ of habeas corpus, Congress has instructed the inferior federal courts to refrain from this sort of fine tuning. We hold accordingly that Lindh is not entitled to a writ of habeas corpus.

AFFIRMED

DIANE P. WOOD, Circuit Judge, concurring in part and dissenting in part, with whom RIPPLE and ROVNER, Circuit Judges, join Part II.

This case underscores both the importance and the difficulty of the task with which courts are charged under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214, in applying the new substantive standards for the issuance of writs of habeas corpus in proceedings brought by state prisoners under 28 U.S.C. § 2254. Although I concur with most of the majority's analysis of the new law, I dissent from the way it has been applied here.

I

*23 With one reservation, I concur in Part I of the majority's opinion, which holds that the amended version of § 2254 applies to Lindh's case. My reservation relates only to the ancillary decision to deny Lindh's motion to supplement the record in this court. See ante, at 16. Lindh wanted to demonstrate that the record in the Wisconsin court reflected Dr. Leigh Roberts' suspension of privileges at the University of Wisconsin Hospitals by the time of the trial. This is not an effort to introduce new evidence in any sense of that term; it is only an effort to show us what was legitimately in the record before the Wisconsin courts. In my view, in light of the changes in the law that have occurred and the lack of prejudice to all concerned, we should grant that motion.

I am also in substantial agreement with Parts II.A and II.B of the majority's opinion, which hold that the amended version of § 2254(d)(1), construed properly, does not unconstitutionally trample on the Article III powers of the federal judiciary. In particular, I agree that nothing in the language of § 2254(d) requires the federal courts to "defer" to the legal determinations of the state courts, and therefore we need not confront the serious constitutional issues that would arise if the contrary were true. I begin to part company with the majority where it foreshadows its discussion in Part II.C of its opinion and suggests that we "need not shoulder the potentially difficult task of determining when an appellate gloss on a decision of the Supreme Court has so far departed from its wellsprings as to be the 'real' source of law...." Ante, at 20. For better or for worse, that task will be ours in virtually every case that comes before us under the amended law; because it is rare indeed that we will see something identical in all particulars to a case already decided by the Supreme Court. However minor the factual variations, we both can and must look for guidance in our own decisions, decisions from other appellate courts (federal and state), and persuasive secondary sources.

I also disagree with the majority's statement, ante at 22, that one ingredient of Lindh's claim is not well established. As I explain in more detail below, the majority's description of the Wisconsin scheme is incomplete, and is therefore potentially misleading. Whether the Wisconsin court labeled this phase "dispositional" in its opinion in State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), is not controlling as a matter of federal law. These are questions, however, that go to the application of amended § 2254(d), not to its compatibility with Article III.

Finally, in broad terms I agree with the majority's interpretation of the key components of § 2254(d)(1) and its explanation of the difference between something "contrary to" clearly established law and something that is an "unreasonable application of" such law. My concern is with a few statements that I fear could be misunderstood. For example, the majority states broadly that the "contrary to" language of § 2254(d) does not authorize issuance of a writ whenever a court errs. If all it means by that is that doctrines like harmless error continue to apply, then the

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statement is a harmless truism. If it were read to imply that prejudicial errors of law can be ignored, however, it would be wrong. The statute does authorize issuance of a writ, if the state court has committed a pure error of law. This is because the federal court has the power to decide whether the state court followed clearly established law as declared by the Supreme Court of the United States and because no deference is owed to the state court's own views of that issue. The real problem is a familiar one (though no easier for being familiar): when is the issue purely one of law, and when is it a mixed question of law and fact. If the federal court concludes (de novo) that the state court has not made an error of law, then the question becomes whether there has been an unreasonable application of the law. This, I agree, is another way of describing the "mixed question of law and fact" situation. Unreasonableness makes sense as a standard here, if for no other reason than the deference that is owed to the state court's determination of the facts, see § 2254(e). The majority suggests that when the constitutional question is a matter of degree, rather than of concrete entitlements, the federal court must honor a "reasonable" decision by the state court. Most constitutional entitlements in the area of criminal procedure have elements of both: if a defendant's rights under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), have been violated with respect to part of the prosecutor's file, it is little comfort that the prosecutor turned over other Brady material; the same goes for Confrontation Clause rights of the sort we have here. Just because one can cross-examine a witness about prior inconsistent statements, for example, does not mean that cross- examination is unnecessary to show that the same witness had a plea bargain with the government. Many of these rights, in short, will not be matters of degree when we address them at the proper level of detail: the deprivation will be clear, and the federal court must decide whether the right was violated.

II

*24 In order to explain why I disagree with the majority's resolution of Lindh's own case under the principles set forth in its opinion, it is necessary to supplement the statement of facts and the description of the procedures used in Wisconsin cases where a plea of not guilty by reason of mental disease or defect is entered.

Lindh went on his shooting rampage in the City-County Building in Madison, Wisconsin, on January 15, 1988. He himself was shot during the melee, was apprehended immediately, and was taken to the hospital under police custody. At 9:00 p.m. that evening, the district attorney's office contacted Dr. Roberts at his home and asked him to interview Lindh at the intensive care unit. Roberts agreed and promptly went to the hospital, arriving around 9:30 p.m. Lindh spoke with Roberts for some time, telling him about the circumstances preceding the murders and his feelings. Roberts elicited statements from Lindh indicating that he was not experiencing suicidal feelings, depression, hallucinations, or the like.

Lindh was arraigned in Dane County Circuit Court on February 26, 1988, and entered pleas of not guilty and not guilty by reason of mental disease. At that time, the court appointed Roberts and Dr. Frederick Fosdal, another forensic psychiatrist, to examine Lindh on behalf of the state. Shortly thereafter, Roberts learned that the University of Wisconsin Hospitals were investigating allegations that he had engaged in sexual misconduct with a female patient--allegations that he knew could lead to loss of his license and criminal penalties. In May 1988, the Medical Examining Board asked Roberts to provide it with records, revealing to Roberts that the Board, too, was concerned about these allegations.

In the meantime, Roberts continued to work on the Lindh case. On June 22, 1988, he interviewed Lindh again. The very next day, June 23, 1988, attorneys for the University of Wisconsin Hospitals referred the sexual misconduct allegations to the Dane County district attorney's office. Recognizing the potential for a conflict of interest, that office

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referred the case to a special prosecutor from the Milwaukee district attorney's office. Roberts learned of that appointment and of the criminal investigation on July 8, 1988. It was not until August 17, 1988, that Roberts first produced a written report on the case, which concluded that Lindh was not suffering from a mental disease or defect at the time of the shootings. On August 22, 1988, he interviewed Lindh a final time. Lindh alleges, as noted above, that the state trial court record shows that Roberts was suspended from the University Hospitals some time during the summer. Whatever the status of that allegation and his unsuccessful motion to supplement the record, it is clear that the state Medical Examining Board filed a civil complaint against him in August to take away his license, based on alleged sexual exploitation of three patients. Crucially, all these events transpired before the trial in Lindh's case.

*25 On September 12, 1988, the state filed a motion in limine requesting that the trial court prohibit any cross-examination of Roberts concerning the allegations of misconduct pending against him or concerning any ramifications of those pending charges. Lindh opposed the motion, arguing that the circumstances raised serious questions about Roberts' bias, motive, and interest. First, Roberts would present himself as a distinguished professional, and the jury might give less weight to his opinion if it knew that proceedings to revoke his license were pending. Second, defense counsel noted that University Hospitals had already suspended Roberts' privileges, which was important for the jury to know. Finally, Lindh argued that Roberts would have an incentive to please the prosecution, regardless of the technical fact that the particular prosecuting attorney was from Milwaukee rather than Madison. The case had received state-wide notoriety, and Roberts himself was a well-known expert witness. Unmoved by Lindh's arguments, the trial court granted the state's motion and found that evidence relating to the investigation of Roberts' misconduct was "totally irrelevant and immaterial."

When Roberts took the stand to offer his testimony, Lindh's worst fears were realized. During the initial presentation of his credentials, the jury learned that Roberts was a faculty member of the University of Wisconsin Medical School, that he was "on the adjunct faculty of the San Francisco Theological Seminary," that he had chaired conferences "in relation to religion and mental health," that about three years before he had been "honored ... as essentially the mid-west psychiatrist of the year," and, on top of all that, that he was a loving grandfather with eight grandchildren "up to nearly the age of Mr. Lindh." Because of the trial court's ruling, the jury never learned that Roberts' affiliation with the University of Wisconsin was in peril, nor that he was about to lose the prestigious standing in the profession he had enjoyed up to that time. Worst of all, the jury never learned that Roberts might have had a motive to favor the prosecution in his testimony.

As Wisconsin law requires in cases like Lindh's, there was a "continuous trial" in which the jury first considered the plea of not guilty, and, having concluded that Lindh was guilty, then considered his plea of not guilty by reason of mental disease or defect. See Wis. Stat. Ann. § 971.165(1)(a). The jury's one-sided picture of Roberts was particularly troubling because Roberts was the prosecution's star witness during the second (mental disease) stage of the proceedings. Emphasizing his superior ability to diagnose Lindh due to the contemporaneous interview he had conducted on the date of the shooting, Roberts testified that Lindh was not suffering from any psychosis at the time of the shootings and was fully capable of understanding the wrongfulness of his actions and conforming his behavior to the requirements of the law. The defense called Dr. Ezra Griffith, who testified that Lindh suffered from a mixed personality disorder and was in a brief reactive psychosis during the shootings. According to Griffith, Lindh was unable to appreciate the wrongfulness of his actions and conform his conduct to the law when he was in such a state. Finally, the other prosecution expert, Dr. Fosdal, offered

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an opinion somewhere in the middle: he agreed with Griffith that Lindh was suffering from a mixed personality disorder, but he disagreed that Lindh had experienced a brief reactive psychosis during the shootings. With this evidence before it, the jury found that Lindh was able to appreciate the wrongfulness of his conduct and to conform it to the law. See Wis. Stat. Ann. § 971.15(1). In accordance with Wisconsin law, the judge therefore proceeded to the sentencing phase of the proceeding, see Wis. Stat. Ann. § 971.165(3)(a), and imposed a sentence of life in prison.

*26 Wisconsin uses a three-phase proceeding in cases in which the mental responsibility of the defendant is at issue. A defendant is entitled to couple a plea of not guilty with a plea of not guilty by reason of mental disease or defect, pursuant to Wis. Stat. Ann. § 971.165(1). The statute establishes the order of proceedings for the two pleas as follows:

(a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

Section 971.15(3), Wis. Stat. Ann., provides that "[m]ental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable degree of certainty by the greater weight of the credible evidence."

If the jury finds the defendant not guilty on the first plea, the court must enter a judgment of acquittal and discharge the defendant. § 971.165(1)(d). If, on the other hand, the jury finds the defendant guilty on the first plea, then the trial continues into phase two and the court withholds judgment pending the jury's determination on the second plea. Id. At the end of the second phase, the jury either finds that the defendant is not guilty by reason of mental disease or defect, or that the defendant is guilty (i.e. his affirmative defense fails). § 971.165(3). At that point, the court either enters a judgment of "not guilty by reason of mental disease or defect," or it enters a judgment of conviction. Id. After the appropriate judgment is entered, the court concludes the proceedings with phase three, which is either a commitment hearing pursuant to § 971.17(2)(a) or a sentencing proceeding pursuant to §§ 972.13, 972.14, and 972.15. For those found not guilty by reason of mental disease or defect, the statute requires the court to commit the person to the department of health and social services for a specified period not exceeding two-thirds of the maximum term of imprisonment that could have been imposed, unless the maximum term of imprisonment is life, in which case the commitment period can also be life. § 971.17. As soon as six months after the person is committed, he is entitled to petition for conditional release. § 971.17(4)(a). He can continue filing these petitions once every six months. Importantly, the court "shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released." § 971.17(4)(e). A person who wins conditional release can then petition the court for termination of the order of commitment. § 971.17(5).

The Wisconsin Supreme Court discussed the predecessor statute to § 971.165 extensively in State v. Koput, supra, in which the principal issue was whether the jury verdict in phase two must be unanimous. It distinguished the responsibility phase of the bifurcated trial used in Wisconsin from the guilt/innocence phase, labeling it "a special proceeding in the criminal process in which the defendant has the burden of proof to establish his lack of responsibility to a reasonable certainty by the greater weight of the credible evidence." 418 N.W.2d at 805. It rejected the public defender's arguments that the usual protections for a criminal trial, such as the need for a unanimous verdict by a jury of twelve, and the requirement of proof beyond a reasonable doubt, applied in the phase two proceeding. The affirmative defense tried during phase two related only to "responsibility," and had the effect of relieving the person of the sanctions for criminal conduct. The finding of guilt during

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phase one, however, is unaffected by phase two. For that reason, the Wisconsin Court concluded that phase two was "dispositional" in nature and that the jury rules for phase one were inapplicable. Id. at 812.

*27 In its opinion in Lindh's case, the Wisconsin Supreme Court indicated that the Confrontation Clause of the Sixth Amendment, as well as its analog in Article I, section 7 of the Wisconsin Constitution, applies to the phase two proceeding. See State v. Lindh, 161 Wis.2d 324, 468 N.W.2d 168, 175 (Wisc.1991). On one level, that is almost enough for us, because it tells us the significance Wisconsin attaches to this stage of the proceedings. But as an independent matter of federal law, the Wisconsin Supreme Court's conclusion is plainly correct. Clearly established law from the Supreme Court shows that nothing about the phase two proceeding would justify an exemption from the Confrontation Clause.

First, Wisconsin's practice of determining criminal responsibility in the second stage of a bifurcated trial, where the defendant has the burden of proof, is no different from many other state rules that the Supreme Court has approved that similarly shift the burden of proof. See, e.g., Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (state may require accused to prove his insanity beyond a reasonable doubt); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (constitutional to require defendant to prove affirmative defense of extreme emotional disturbance in order to qualify for mitigating factor that reduced a charge to manslaughter); McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (constitutional to use "preponderance of the evidence" standard for the State's burden of proof at sentencing for minimum sentencing law); Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (constitutional for Ohio to require defendant to prove affirmative defense of self-defense by a preponderance, as long as instructions required prosecution to prove all elements of the offense of aggravated murder beyond a reasonable doubt). Thus, the Wisconsin Supreme Court was on firm ground in Koput when it found nothing objectionable about the use of a non-unanimous jury and a shift in the burden of proof for Wisconsin's criminal responsibility determination.

Second, no matter how for purposes of state law Wisconsin wishes to characterize phase two, it is clear that it is the definitive step that yields either a finding of criminal responsibility for the offense, and hence incarceration, or a finding of no criminal responsibility, and hence hospitalization for as little as six months or as much as a lifetime. The majority disregards the provisions of Wis. Stat. Ann. § 971.17 when it asserts, ante at 33, that the only consequence of a decision that Lindh was not criminally responsible would be to "change the place of his confinement." The majority dismisses the possibility of release under § 971.17 as trivial, equating it to the chance of release under an indeterminate sentencing scheme. This position, however, overlooks both the critical features of the second phase of the Wisconsin proceeding and the defining characteristics of any sentencing proceeding.

*28 It is undisputed that the second phase trial begins with a plea of "not guilty by reason of mental disease" and ends with a jury verdict of guilty or not guilty. Like all jury verdicts of guilty or not guilty, that is "dispositive" in the sense that it governs what kind of further proceedings will be required, but it is not "dispositive" in the same way a sentencing proceeding is. At the risk of stating the obvious, the purpose of a sentencing hearing is to pronounce the sentence, and the jury's phase two verdict does not even begin to address that subject. A sentence might be a fine or incarceration, or some combination of the two. It might include a period of probation or supervised release; construing the term broadly, it might even include commitment to a mental institution for a period of years. These issues are simply not before the court or the jury during the phase two trial in Wisconsin. Its sole purpose is instead to decide whether the person is criminally responsible, and hence will receive a criminal sentence, or if the person is not to be held responsible and instead is to receive

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involuntary commitment to a mental institution. (The latter, of course, occurs every day in contexts far removed from the criminal justice system.) The fact that the verdict of "guilty" from phase one stands does not distinguish this from many other situations-- such as self-defense, heat of passion, or justification-- where it is clear that the defendant committed the criminal act, but he will not be punished for it. Furthermore, the analogy to parole or release under an indeterminate sentencing scheme does not hold up. No such system of which I am aware confers an entitlement on the defendant to win release unless the court finds by clear and convincing evidence that he must remain incarcerated. Yet this is exactly how the commitment rules in Wisconsin operate for individuals found not to be criminally responsible for their acts. See Wis. Stat. Ann. § 971.17(4)(d), (5).

The Supreme Court has always required application of the Confrontation Clause to proceedings that begin with a plea of not guilty and conclude with a finding of guilt or acquittal. Cruz v. New York, 481 U.S. 186, 190, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987) (for purposes of the Confrontation Clause, a witness against a defendant is anyone whose testimony "is part of the body of evidence that the jury may consider in assessing his guilt."); Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (holding the right of confrontation applicable to the states under the Fourteenth Amendment). More than that, it has applied the Confrontation Clause to capital sentencing proceedings, where it is true that the only difference is in the nature of the sentence imposed (albeit an exceptionally important difference), explicitly recognizing the need for adversarial debate in such a context. See generally Gardner v. Florida, 430 U.S. 349, 360, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."). The plain fact here is that Lindh could, in the words of the Wisconsin Supreme Court, have been "relieve[d] ... of the sanctions for criminal conduct" at the end of the phase two proceeding. See Koput, 418 N.W.2d at 812. It is no expansion of clearly established Supreme Court law to find here that stakes of this magnitude in the proceeding bring the Confrontation Clause into play, as the Wisconsin Supreme Court itself recognized.

*29 Decisions of the Supreme Court of the United States also establish that Lindh's right to confront Roberts was impermissibly restricted, through the trial court's grant of the motion in limine. The two key cases, the majority agrees, are Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), and Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). In the 1974 Davis decision, the Supreme Court began with the observation that "[c]onfrontation means more than being allowed to confront the witness physically." 415 U.S. at 315. The main and essential purpose of confrontation is "to secure for the opponent the opportunity of cross- examination." Id. at 315-16 (emphasis in original). Cross-examination involves both the testing of the witness's story and impeachment or discrediting of the witness. As the Davis Court said, "[a] more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Id. at 316. The Court held that counsel should have had the opportunity not only to ask the witness in question whether he was biased, but also to explore why he might have been biased or otherwise lacked impartiality.

The Court reiterated all these points in Van Arsdall. Notably for Lindh's case, it drew a distinction between trial court control of cross-examination to limit harassment, confusion, repetition, or the marginally relevant, and the prohibition of all inquiry into the possibility of a witness's bias. 475 U.S. at 679. It held that:

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross- examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." 475 U.S. at 680, quoting from Davis v. Alaska.

The particular risk of bias in Van Arsdall was quite similar to the type Lindh wished to put before the jury. The trial court in Van Arsdall prohibited inquiry into the terms of an agreement the witness had made with the prosecutor to drop a drunk driving charge in exchange for his testimony about the murder. There was nothing unusual or unprecedented in Lindh's effort to show that Roberts, too, might have been shading his testimony with the ulterior motive of securing better treatment from the state. Thus, Supreme Court decisions establish both that the Confrontation Clause applies to the kind of proceeding we have here, and that the Confrontation Clause is violated when the defendant is precluded from exposing "possible biases, prejudices, or ulterior motives." Davis, 415 U.S. at 316.

*30 The only question remaining is whether the Confrontation Clause was violated here, when the trial court precluded all inquiry into the proceedings at which Roberts risked loss of his professional license, obloquy from his peers, and criminal conviction. Both the Wisconsin Supreme Court and the majority here believe that the administrative transfer of the case from the Dane County prosecutor's office to the Milwaukee special prosecutor erased all possibility of concern from Roberts' mind. In my view, this asked the wrong question (i.e. was it sufficient when steps were taken to assure formal insulation of the Milwaukee prosecutor from the Dane County office), and thus produced the wrong answer. The focus must instead be on Roberts' motivations to shade his testimony, just as it was in Van Arsdall. It is worth recalling what had already happened to Roberts, before deciding whether the trial court erred in its total exclusion of the impeachment testimony. The two critical dates are July 8, 1988, and August 17, 1988. No later than July 8, 1988, Roberts knew that a criminal investigation of his activities was underway, with all that implied for his career. Yet it was not until August 17, 1988, as far as this record shows, that he first reduced his conclusions about Lindh to writing. The majority comments that there is no reason to believe Roberts changed his mind between the initial interview on the date of the shooting and August 17, but there is obviously no way to know if the trial court forbade inquiry and cross-examination on the matter. (The majority suggests that Roberts was open to "unfettered cross-examination" on this issue, but that cannot be true given the fact that Lindh's counsel was forbidden to question Roberts on the one fact that might have led Roberts to change his mind: his legal problems, and his hope of winning favorable treatment from the prosecutors.) By the time the trial started, the state Medical Examining Board had also filed a civil complaint against Roberts to take away his license. Again, the jury knew nothing of this; instead, it was informed that he was "mid-west psychiatrist of the year."

Cross-examination on Roberts' legal difficulties was required for at least two reasons. First, when expert witnesses are proffered the jury is entitled to learn about their qualifications. See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Particularly in a field like psychiatry, where methodologies are not readily subject to the kind of objective scientific verification the Supreme Court called for in Daubert, the jury is entitled to evidence that will suggest what weight it should give to the expert's opinions. It is fanciful to assume that a jury would give the same weight to the "mid-west psychiatrist of the year" as it would give to someone who was facing both criminal charges and civil proceedings to revoke his license. Second, as Justice Abrahamson of the Wisconsin Supreme Court so ably demonstrated in her dissenting opinion, Roberts subjectively may have believed or hoped that a "good performance" on his part for the state might cause the prosecutor to treat him leniently. The fact that the prosecutor was called a "special prosecutor" for Dane County, rather than a member of the usual staff, cannot have

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made any difference from Roberts' subjective viewpoint. The courts regularly see witnesses in criminal trials who face charges in multiple jurisdictions (federal and state, or several states or parts of states), and the witnesses are aware that their performance is being watched by all concerned. If a witness were testifying in a case before the Circuit Court of DuPage County, Illinois, and that witness were facing charges in Cook County, the State's Attorney would have no ground for keeping out cross-examination designed to show hope of favorable treatment at the hands of the Cook County authorities. Roberts' case is no different.

*31 Indeed, the case is even stronger for finding that Roberts may have entertained such a hope. Not all criminal prosecutions--not even all murder prosecutions--receive state-wide publicity, but the Lindh case did. Roberts, who had testified by his own account all over the state, knew that he was known in Milwaukee, just as he was known in other parts of Wisconsin. He had every reason to begin his efforts for leniency on the witness stand in Lindh's case. (Although it is not relevant to the trial court's ruling on the motion in limine here, the record of the actual criminal sentencing that took place after Roberts was convicted on the charges shows that his expectations were well founded. Both the prosecutor and the judge expressed intense regret at having to sentence him to anything at all, given his outstanding service to the state over many years.)

Van Arsdall and Davis make clear that the trial court did not face an "all or nothing" option with respect to the proffered impeachment testimony. It was entitled to place reasonable limits on it, to avoid having the jury distracted with Roberts' problems. The trial court could, for example, have permitted cross-examination about the existence of the pending charges and forbidden discussion of their basis, instructing the jury that the nature of the professional misconduct charges was not relevant. This, or other possible limitations, would have eliminated or minimized any risk of a salacious exploration of Roberts' sexual proclivities. The problem here, as in Van Arsdall, lay in the total exclusion of the evidence. It is impossible, given the absence of scientific validation of this kind of psychiatric diagnosis, to say that this error was harmless. The jury literally had to decide whose word it would accept: Roberts', Fosdal's, or Griffith's. We must recall that only Roberts testified both that Lindh had no personality disorder and that he was responsible at the time of the offense. The jury would have seen an entirely different picture if Roberts had been discredited, and it was left only with Fosdal, who agreed that Lindh had a personality disorder but who thought he was responsible at the time, and Griffith, who thought Lindh had the disorder and was not responsible for what he did. Lindh, recall, had only to persuade the jury by a preponderance of the evidence that he was suffering from a mental disease or defect and could not conform his actions to the law.

In my view, the adjudication of Lindh's claim in the Wisconsin courts resulted, in the words of § 2254(dX1), in a decision that was contrary to clearly established federal law as determined by the Supreme Court of the United States. To the extent it might better be characterized as a mixed question of law and fact, the Wisconsin decision was an unreasonable application of clearly established federal law. For the reasons I have explained, I would grant the writ of habeas corpus.

RIPPLE, Circuit Judge, with whom ROVNER, Circuit Judge, joins, dissenting. [FN*]

*32 This case presents several issues involving the new amendments to section 2254 of the Judicial Code. Among those issues, the one of most enduring importance is whether the new section 2254(d) is compatible with the judicial role of the United States courts required by the Third Article of the Constitution. The problematic subsection, identified as such by the President in his approval of the legislation [FN1] and by legislators who favored and opposed the measure, forbids the issuance of a writ of habeas corpus unless the decision of the state

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court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

1.

Several rules of statutory construction are pertinent to our analysis. First, we must remember that the statute must be interpreted as a whole. The amended language therefore must be considered in relation to the unamended language. We must give every word of the statute a meaning. We cannot assume that Congress intended certain words or phrases to have no force and effect. See Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 837, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). We also must attempt to interpret the statute in a manner that renders it constitutional. See Johnson v. Robison, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). In doing so, however, we must not give the statute a strained meaning that clearly was not the intent of Congress. See, e.g., Seminole Tribe of Florida v. Florida, --- U.S. ----, ---- n. 9, 116 S.Ct. 1114, 1124 n. 9, 134 L.Ed.2d 252 (1996).

We turn briefly to another preliminary consideration. The text of the amended statute sets forth what can be characterized semantically as two separate requirements: (1) that the underlying state decision be contrary to or involve an unreasonable application of federal constitutional law; and (2) that the applicable federal constitutional law have been determined by the Supreme Court of the United States. Ease of presentation and discussion certainly suggests such a division and the majority adopts it as its analysis. In the paragraphs that follow, the same pattern will be followed as a preliminary matter. However, we must also remember that the structure of our analysis can, and indeed often does, predetermine the result. This two-pronged approach, helpful as it is in the presentation of the material, must be critically evaluated because, although it has the virtue of clarity, it may well not reveal the true operation and effect of the statute and therefore present a skewed model for final evaluation of the amendment's constitutionality.

Finally, it is important to note that, both before and after the amendment in question, the fundamental task of the judiciary under this statute remains unchanged: Congress has given the federal courts, including this court, the task of determining whether a state prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254. Under the previous version of the statute, the federal court determined on its own the applicable federal constitutional standard. The new statute operates in a decidedly different manner. Having given the federal courts the jurisdiction to determine whether a person is being held in custody in violation of the Constitution and laws of the United States, Congress now has also mandated how the courts will determine the applicable constitutional standard.

2.

*33 Under the new amendment, in ascertaining whether there has been a violation of the Constitution, the courts are restricted to the case law of the Supreme Court of the United States; they are not permitted to rely as well upon their own precedent. In short, Congress, although continuing to vest the federal courts with the authority to decide whether a person is being held in state custody in violation of the Constitution, has now specified that the judiciary is required to disregard the work product of one of its components, a source of law upon which the courts otherwise would rely in the adjudication of the case.

It is a "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected ... as a permanent and indispensable feature of our constitutional system." Cooper v. Aaron, 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). As Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), made clear in the earliest days of the Republic, this obligation flows from the constitutionally imposed obligation of the

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courts to decide cases within their jurisdiction and to determine and apply the law necessary to adjudicate those cases.

In determining whether Congress has intruded impermissibly into the federal judicial function, we must, as the majority acknowledges, first determine, with specificity, the nature of the judicial power. There can be no disagreement with the basic proposition that the Constitution, in its very text, makes clear that, once created, the inferior federal courts share the judicial power with the "one Supreme Court" mentioned explicitly in the constitutional text. Nor can there be any disagreement that such power must be exercised in light of the "revisionary" jurisdiction of the Supreme Court. Beyond this point, however, it is difficult to determine the precise contours of the majority's concept of the federal judicial power. Despite its emphasis on the distinctive responsibility of an inferior court, it describes the role of that inferior court as simply placing a "gloss" on the work of the Supreme Court. If we are to understand the constitutional function that we are duty bound to protect, a far more carefully drawn description of its contours is indicated. It helps little to define it in the negative; it is obviously not the "agency relationship" that exists between the Chief Executive and the executive departments of the government.

The relationship and interreaction of the various levels of the judiciary in molding constitutional doctrine is the product of a carefully crafted balance of power between the judiciary and the legislative branch. That balance of power is constitutionally based. Through its control of the appellate jurisdiction of the Supreme Court and the entire jurisdiction of the lower courts, Congress certainly can influence the development of the constitutional doctrine. However, just as there are limits on the constitutional authority of the judicial branch, so too there are limits on the power of Congress to dictate the process of decision-making within the judicial department with respect to the meaning of the Constitution. Although Congress has the authority to create and abolish the lower federal courts and to regulate their jurisdiction, it has no power to dictate how the content of the governing law will be determined within the judicial department. In the present jurisdictional structure ordained by Congress, it is the responsibility of the Supreme Court of the United States to regulate, principally through the doctrines of stare decisis and precedent, the jurisprudence of the lower federal courts. Control of the law making function of the lower federal courts, within the hierarchical nature of the judiciary, is therefore a matter within the province of the Supreme Court. The Supreme Court of the United States, with the authority to bring a court of appeals to doctrinal heal, determines the degree to which the lower courts ought to be permitted to engage in constitutional doctrinal development.

*34 When a case comes before an inferior federal court in the normal course of its exercise of jurisdiction, it is the duty of that court to determine the constitutional question before it. The inferior courts have a clear responsibility to refine the basic constitutional principles enunciated by the Supreme Court. The task is accomplished through the process of reasoned elaboration disciplined by the doctrines of stare decisis and precedent. The duty "to say what the law is" is a unitary one within the unitary judicial department created by the Constitution. See Plaut v. Spendthrift Farm, --- U.S. ---, ---, 115 S.Ct. 1447, 1457, 131 L.Ed.2d 328 (1995) ("not a batch of unconnected courts, but a judicial department composed of 'inferior Courts' and 'one Supreme Court' ") (emphasis in original). In performing that function, an inferior federal court is not free to determine the content of the Constitution without reference to the existing jurisprudence of the Supreme Court of the United States. It must decide the case, but it must decide it as it believes, after study of and reflection upon existing case law, the Supreme Court of the United States would decide it under the Constitution. See Levine v. Heffernan, 864 F.2d 457, 459 (7th Cir.1988), cert. denied, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989). The Supreme Court then determines, in due course, whether the doctrinal development will be short- lived or

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remain a long-term part of the fabric of the constitutional jurisprudence of the judicial department of government. One justice described the interrelationship of the work of the inferior and Supreme Court by explaining the Supreme Court's scrutiny of the work of the lower courts in these terms: "Across the screen each Term come the worries and concerns of the American people--high and low--presented in concrete, tangible form." Tidewater Oil Co. v. United States, 409 U.S. 151, 175, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972) (Douglas, J., dissenting). The longevity of our constitutional jurisprudence is a matter that Congress can control only through the initiation of the amendatory process or through the alteration of the jurisdictional scheme. Congress otherwise has no more right than we to determine those aspects of our jurisprudence that the Supreme Court will allow to endure.

In section 2254, Congress has given the district court the task of determining whether a person is being held in violation of the Constitution. To require the federal judiciary to hold that there is no constitutional violation simply because there is no case of the Supreme Court of the United States directly on point, is to deny it the right to refer to the corpus of jurisprudence to which it turns when it must "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); see also Wright v. West, 505 U.S. 277, 305, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) ("We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.") (O'Connor, J., concurring). The amended statute requires that we decide whether a person is in custody in violatihe law is.") (O'Connor, J., concurring). The amended statute requires that we decide whether a person is in custody in violation of the Constitution without consulting the body of law that determines what the judicial department says the Constitution requires. [FN2]

3.

*35 Limiting the judicial function of determining the meaning of the Constitution to a scrutiny of the decisions of the Supreme Court is, in itself, a sufficient constitutional infirmity to vitiate the amended statute. An examination of the "second requirement," independent of the first, raises, however, substantial additional concerns about the amendment's effect on the constitutional integrity of the Third Branch.

The amended statute requires that, although the district court has the obligation under the statute to issue the writ when the person is held in violation of the federal Constitution, the court must accept as definitive an interpretation of the federal Constitution by the state court, if that interpretation is a reasonable view of the clear precedent of the Supreme Court. Assuming arguendo that a reference only to the clear precedent of the Supreme Court is constitutionally acceptable, even the decisions of the Supreme Court do not form the substantive rule of decision in granting or denying the writ unless the state court's decision is deemed unreasonable. Even if the Supreme Court's rendition of the Constitution is "clearly established," it becomes the rule of decision only if the state court's interpretation of the federal Constitution is deemed to be very different from that of the Supreme Court of the United States. Otherwise, the state's view of the Constitution, not the Supreme Court's view, is operative.

Cast in its best light, this argument, at bottom, characterizes the restriction contained in the amendment as one of remedy: Congress simply has determined that the writ is to be available to state prisoners only when the state court's departure from the federal norm had been "unreasonable." Habeas relief is to be limited to those instances in which the degree of departure from the federal standard is so great as to have worked a gross deprivation of federal protection. This argument can be best evaluated by examining the support that the majority offers for this characterization. In its attempt to justify this approach, the majority points to other instances in which, despite the existence of a constitutional violation, plenary relief may not be available to an aggrieved individual.

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At first glance, these instances present seductive analogues to the present situation. Upon closer scrutiny, however, it is clear that in none of these instances is the federal court deprived of its essential responsibility and prerogative to define the meaning of the federal Constitution and to apply it to the case before it. Therefore these superficial comparisons provide no support for the statute under review in the present case.

There are several instances in which federal courts, although both declaring and applying the Constitution of the United States, place significant limitations on the available remedy. For example, in adjudicating a civil rights matter under section 1983, a federal court determines the applicable federal constitutional rule and applies it to the case before it. Its view, not the view of any other sovereign, determines the applicable constitutional standard. Nevertheless, if a violation of a substantive constitutional standard is identified, the available remedy will vary depending on the circumstances. [FN3] So too, in our Fourth Amendment jurisprudence, the legality of the search always remains a matter of federal constitutional law, although the remedy of the exclusionary rule is inapplicable when the law enforcement officer reasonably relied upon a judicially issued search warrant. See United States v. Leon, 468 U.S. 897, 925 (1984).

*36 In the area of habeas corpus, the same pattern is evident. Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), simply holds that violations of the Fourth Amendment are not cognizable on habeas review because the violation does not affect the truth-finding process that is the principal focus of habeas relief. There is no deprivation of either the law declaring function or the adjudicatory function of the federal courts. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), likewise leaves intact the essential functions of the adjudicatory process. The case is adjudicated by the federal court on the basis of federal law. The rules of retroactive application of new developments are adjusted to take into account the nature of habeas relief. [FN4] It is not accurate, therefore, to term this amendment a mere extension of the principle of Teague. There is a qualitative difference-a constitutional difference--between fixing the time frame at which federal law will be applied and requiring that the federal court defer to any application of constitutional principle that cannot be characterized as unreasonable. Under the latter approach, mandated by the amended statute, the federal court must be content with a careful application of the Constitution, even if it is wrong. In essence, the federal court is free to have its own opinion of what federal law requires, but it must grant or deny the writ on the basis of another non-federal tribunal's view. Federal courts, however, must not merely expound on the cases before them; they must decide them. Plaut, --- U.S. at ----, 115 S.Ct. at 1453. The judicial power is the authority, and the obligation, to adjudicate the case. Adjudication involves more than just the opportunity to declare the content and meaning of the law; it also involves the authority to apply that law as well.

4.

The magnitude of the deprivation worked on the judicial function can best be appreciated, however, by assessing the impact of the two phrases of the amendment together. Under the new scheme, the only permissible reference to federal constitutional law is to clearly established Supreme Court precedent. That precedent becomes the rule of decision with respect to the issuance of the writ only if the state court reaches an unreasonable view. When we pause to reflect on the role of the Supreme Court of the United States in constitutional adjudication and on the majority's view as to how reasonableness is to be measured, it becomes clear that any suggestion that a federal rule of decision will be applied to adjudications under section 2254 is illusory.

First, it must be remembered that it has never been the role of the Supreme Court of the United States to micro-manage the development of federal constitutional jurisprudence. From the days of the Great Chief Justice in McCullough v. Maryland, 17

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U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1818)--"[W]e must never forget that it is a constitution we are expounding"--to Congress' ratification of that role in the latest reassessment of the certiorari statute, see 28 U.S.C. § 1254 (1994), the Supreme Court's function has been to set, at a significantly broad level of generality, the guiding principles of our constitutional jurisprudence. Further application of those principles has been the work of the lower federal courts under the scrutiny of the Supreme Court.

*37 In state criminal proceedings, these general principles must be applied, in the first instance, by the state courts. See U.S. Const. Art. VI. On habeas review, the majority holds that it is not simply a matter of the lower federal court's giving respectful heed to the interpretation of the federal constitution rendered by the state court. Rather, the lower federal court must accept as the federal rule of decision the state court's view as preferable to its own. Moreover, given the broad level of generality at which the Supreme Court usually articulates the general principles of constitutional criminal procedure, the difference between the views of the federal and state court may indeed be substantial. Nevertheless, the majority tells us that these issues are "[q]uestions of degree" and that a reasonable decision of the state court must be honored. "Questions of degree" are subjects "painted in shades of grey, rather than in contrasting colors...." This statement stands in stark contrast to the Supreme Court's own description of "contrasting colors" in Estin v. Estin, 334 U.S. 541, 545, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948): "there are few areas of the law in black and white. The greys are dominant and even between them the shades are innumerable. For the eternal problem of the law is one of making accommodation between conflicting interests." The majority requires deference on all questions of degree. Yet, as the Supreme Court itself reminded us in Estin, discerning among the shades of grey is the essence of the adjudicatory function. See Miller v. Fenton, 474 U.S. 104, 112, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) ("But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination."). By suggesting that the amendment deprives the federal district court of responsibility for all questions of degree, the majority points graphically to why the amendment does not leave intact the integrity of the Third Branch: it deprives the federal court not only of its prerogative to determine the content of federal law, but also of its right and duty to apply that law to the case before it.

As the Supreme Court has reaffirmed "time and again," the Constitution assigns to each of the three coordinate branches their own responsibilities and vests in each their own powers. Morrison v. Olson, 487 U.S. 654, 693, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). And although the Supreme Court has rejected the formalist view that there is to be no "control or coercive influence," [FN5] exerted by one branch over another, if one branch, through its actions, "unduly interfere[s]" with the role of another, such actions are void. Morrison, 487 U.S. at 693. In making this determination of "whether an Act [of Congress] disrupts the proper balance between the coordinate branches," we are to focus "on the extent to which it prevents ... [another] Branch from accomplishing its constitutionally assigned functions." Nixon, 433 U.S. at 443. The amended statute significantly "interfere[s]" with the judicial role and to a great extent prevents the judicial department from accomplishing its "constitutionally assigned functions." Simply put, the statute, as amended, deprives a federal court of the right to adjudicate the case. And a court that does not adjudicate advises: a role decidedly different than the one the Constitution envisions for courts and judges of the Third Article.

FN* Judge Ripple also joins Part II of Judge Wood's dissenting opinion.

FN1. Statement of the President of the United States Upon Signing the Antiterrorism Bill, April 29, 1996, 1996 WL 203049 (White House).

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FN2. The majority appears to sense the incongruity of its position when it seemingly acknowledges that such an intrusion into the federal judiciary's adjudicative function would not be permissible in the regular case or controversy but is acceptable in the case of habeas corpus. For the majority, a habeas corpus proceeding is somehow less of a constitutional case or controversy properly within the jurisdiction of the federal courts. Although this distinction is apparently crucial to its holding, the majority never discloses how or why the habeas jurisdiction of the federal courts somehow is different than other areas of the courts' jurisdiction. Although it is very clear that the Congress, having once enacted a cause of action and vested a tribunal with the authority to adjudicate cases arising under it, can no longer dictate the rule of decision for the resolution of cases under it, we are told--as a matter of ipse dixit--that the situation is different with habeas.

FN3. For instance, although a state official's conduct may be determined to have violated a prevailing constitutional standard, the official may be held to enjoy absolute immunity, see Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (holding that a judge enjoys absolute immunity for judicial acts within his jurisdiction), or qualified immunity, see Malley v. Briggs, 475 U.S. 335, 340, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (stating that qualified immunity for executive officials--state or federal--is the norm), from a damages remedy, although not from a prospective equitable remedy.

FN4. Teague, 489 U.S. at 309 (noting that in the habeas review context, "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system")

FN5. Nixon v. Administrator of Gen. Servs. Admin., 433 U.S. 425, 441-42, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 629, 55 S.Ct. 869, 79 L.Ed. 1611 (1935)).

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WESTLAW

APPENDIX B

Copy mailed to attorneys for parties by the Court pursuant to Rule 77 (d) Federal Rules of Civil Procedures.

U.S. DISTRICT COURT
OCT 4 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

-vs-

Case No. 92-C-690

JAMES P. MURPHY,

Respondent.

DECISION AND ORDER

This matter comes before the Court on Aaron Lindh's ("Lindh") petition for a writ of habeas corpus under 28 U.S.C. § 2254. By way of procedural background, the Court first notes that this matter was initially pending before another branch of this District Court, at which time Lindh filed a motion to compel the State to produce the transcripts of the underlying state trial court proceedings. The State opposed this motion on the grounds that the Court should first address a preliminary constitutional issue raised by Lindh's petition, i.e., whether the Sixth Amendment's right to confrontation applies during the insanity phase of a bifurcated criminal proceeding. This issue, the State argued, did not require reference to the voluminous transcript and, if decided in the State's favor, would obviate the need to reproduce the same. The matter was subsequently transferred to this Court. After a preliminary review of the pleadings, the Court

bifurcated the issue in the manner suggested, primarily because Lindh had no objection to the State's preference to proceed with the constitutional issue first.

The Court recently reviewed this file with an eye towards deciding the constitutional issue briefed by the parties. During the course of this review, however, it became clear to the Court that proceeding in the manner requested by the State was a mistake. Indeed, after a thorough review of the decisions from the Wisconsin Court of Appeals and Wisconsin Supreme Court in this case, it is clear that those courts, along with the trial court, operated under the assumption that the Sixth Amendment's right to confrontation applied during the insanity phase of Lindh's trial. Ultimately, however, the Supreme Court affirmed the trial court's decision denying the cross-examination at issue on *relevancy* -- not constitutional -- grounds. The Supreme Court did so after a thorough review of the evidence and the voir dire relied upon by the trial court, evidence which is already before the Court through respondent's answer herein. Thus, if the state courts were correct in their determination of the relevancy issue, the constitutional issue need not be reached. The Court therefore discusses the relevancy issue first.

I. MOTION FOR TRANSCRIPTS

Lindh's motion to produce the full transcript of the trial court proceedings was tabled on the assumption that the Court was going to address the constitutional issue first. Now that the Court has decided to proceed differently, the motion should be addressed. The Court denies the motion. Full transcripts are not always, or even often, necessary to enable a federal court to decide a § 2254 habeas petition. Here, the question involved is whether the proposed cross-examination of a psychiatric doctor who examined Lindh was relevant as showing

potential bias on the part of the doctor. When Lindh first learned of the potential for bias, his counsel submitted a list of factual questions to the assistant district attorney, seeking detailed information as to the facts supporting the allegations of bias. The Court has a copy of those questions. In response, the assistant district attorney provided detailed answers to all of the questions submitted. The Court has a copy of those answers. During hearings connected with the trial, the State moved to exclude any cross-examination regarding the facts and circumstances of the alleged bias on relevancy grounds, arguing that the facts established by the State in response to Lindh's written questions establishes that the doctor at issue could not possibly have been biased in the manner alleged by Lindh. The trial court first agreed with the State, but then later allowed the parties to voir dire the doctor, outside of the presence of the jury, regarding the facts and circumstances supporting the claims of bias. The Court has a copy of the voir dire transcript. The trial court found, and the Supreme Court agreed, that the testimony brought out on voir dire, which included cross-examination by Lindh's counsel, fully confirmed the facts detailed in the State's responses to Lindh's written questions. Lindh himself acknowledges that the "voir dire disclosed no material variance between Dr. Roberts own responses and Prosecutor Burr's written answers to the defense's Specific Demand for Exculpatory Evidence." (Respondent's Answer, Ex. B at 16, fn. 3.) The trial court then re-affirmed its legal conclusion that the undisputed facts did not give rise to a reasonable inference of bias, and therefore denied the proffered cross-examination on relevancy grounds.

Therefore, it appears to the Court that the facts underlying Lindh's petition are undisputed and contained in Lindh's written questions, the State's

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written responses thereto, the voir dire transcript, and the Wisconsin Supreme Court's discussion of the issue in its written opinion, found at State v. Lindh, 161 Wis.2d 324 (Wis. 1991). All of the foregoing are already before the Court by way of the respondent's answer. The question before the Court, therefore, is simply the legal question of whether those facts were relevant, i.e., whether they gave rise to a reasonable inference of bias, such that a reasonable jury could have disregarded Roberts' testimony as biased and thereby reached a different verdict on the question of insanity. The Court need not have any other portions of the record before it to make that determination. Nor is a traverse necessary from the petitioner. Indeed, on this issue, the Court already has the benefit of the briefs submitted by petitioner to the Wisconsin Court of Appeals and Wisconsin Supreme Court, as well as the decisions from those courts, including the Court of Appeals' decision, which agreed with petitioner's arguments.

II. RELEVANCY

A. Facts.

In the underlying proceedings, Lindh was charged with, inter alia, two counts of first degree murder and one count of attempted first degree murder. Id. The day of the shootings, and shortly after Lindh was taken into custody, Dane County Assistant District Attorney John Burr ("Burr") retained Dr. Leigh Roberts ("Roberts"), a forensic psychiatrist, anticipating that Lindh or others might raise questions concerning Lindh's mental state during the shootings at issue. Id., 161 Wis.2d at 335. That same night, January 15, 1988, Roberts interviewed Lindh in the hospital for purposes of assessing his mental state. Id., at 336. The interview-

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consisted of two sessions of questioning separated by a single 12-minute break. Id., at 336-38.

On February 26, 1988, Lindh was arraigned and entered pleas of not guilt, and not guilty by reason of mental disease. Id., at 338. Roberts was appointed by the Court as one of the doctors who were to examine Lindh on behalf of the State. Id. Shortly thereafter, on March 8, 1988, Roberts became aware that the University of Wisconsin Hospital was investigating an allegation that he had engaged in sexual misconduct with a female patient. Id. At the time, Roberts was generally aware that, if proven true, such allegations could subject him to criminal penalties under a state statute, and he presumed that any such prosecution, if it came to that, would occur in Dane County, where the allegations were made, and would be prosecuted by someone in the Dane County District Attorney's office. Id. Although he admits having this general knowledge, Roberts did not give any particularized thought to the possibility of such a prosecution by the Dane County district attorneys. Id. Sometime in May, 1988, Roberts became aware that the Medical Examining Board was also investigating allegations of sexual misconduct by Roberts with three female patients. Id., at 339. Roberts learned of this investigation when he received a request for records from the examining board. Id.

On June 22, 1988, Roberts interviewed Lindh again, this time at the Dane County jail. Id. The next day, unbeknownst to Roberts, University of Wisconsin Hospital attorneys met with the Dane County District Attorney and referred to him the allegations against Roberts. Id. At that meeting, the District Attorney informed hospital officials that he would immediately seek to transfer the

matter to a special prosecutor because of the potential for a conflict of interest between his office and Dr. Roberts. Id. On June 28 or 29, 1988, the Dane County Circuit Court appointed the Milwaukee County District Attorney's office as special prosecutor for the Roberts matter. Id. At this time, Roberts had no knowledge that charges had been referred to the Dane County District Attorney or that a special prosecutor had been appointed to investigate those charges. Id. No member or representative of the Dane County District Attorney's office, nor any police officer, ever contacted Roberts or his counsel concerning these allegations. Id. Nor did anyone from the Dane County District Attorney's office ever make a formal or informal decision as to whether a formal investigation should proceed, or ever contact the special prosecutor regarding the actual investigation. Id. at 339-40.

On July 8, 1988, Roberts became aware, for the first time, through his attorney, that allegations had been referred to the Dane County District Attorney's office. Id., at 339. At the same time, Roberts also learned that a special prosecutor from outside of Dane County had already been appointed to investigate the allegations. Id., at 339-40. On August 17, 1988 Roberts submitted his report concluding that Lindh was not suffering from a mental disease or defect at the time of the shootings. Id., at 340. On August 22, 1988, Roberts interviewed Lindh for the last time. Id.

On September 7, 1988, Lindh submitted his aforementioned discovery demand upon the State seeking detailed information as to the misconduct allegations against Dr. Roberts and the timing and substance of Roberts knowledge regarding the same. Id. The State promptly responded, and Lindh acknowledged

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that the State fully complied with his discovery request. Id., at 340-41. In a hearing on the State's subsequent motion in limine, the trial court heard oral argument on the same and concluded that the proffered evidence -- consisting of the State's responses to Lindh's discovery questions -- was irrelevant. Id., at 341-43. The trial court reasoned that in light of the fact that the allegations against Dr. Roberts were almost instantaneously transferred out of the Dane County District Attorney's office to the special prosecutor, there was no possibility of bias, motive or interest on the part of Dr. Roberts. Id. at 343. The trial court also concluded that, even if relevant, the probative value of the evidence had to be weighed against the risk of "unfair prejudice", and found that the latter outweighed the former, providing another ground for precluding the cross-examination at issue. Id. At the same time, however, as indicated earlier, the trial court allowed Lindh's counsel to voir dire Dr. Roberts outside the presence of the jury, which voir dire essentially confirmed and reiterated the information contained in the state's response to Lindh's discovery questions. Id., at 343-44. For that reason, the trial court found no reason to alter its prior ruling granting the State's motion in limine. Id.

On appeal, the Wisconsin Court of Appeals reversed the trial court's ruling regarding the relevancy of the proffered cross-examination and the risk of unfair prejudice presented by the same. State v. Lindh, 156 Wis.2d 768 (Wis.Ct.App. 1990). The Wisconsin Supreme Court granted review of the appellate court's decision and reversed the same, finding that the trial court did not abuse its discretion in finding the proffered evidence irrelevant. Lindh, 161 Wis.2d at 345-49. This Court agrees.

B. Analysis.

As The Wisconsin Supreme Court explained, "[t]he confrontation clause of the Sixth Amendment of the United States constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him'" Lindh, 161 Wis.2d at 345-46. More specifically, "[t]he United States Constitution protects the opportunity to cross-examine a witness with regard to bias and motivation to lie." Bell v. Coughlin, 778 F. Supp. 164, 174 (S.D.N.Y. 1991), aff'd, 17 F.3d 390 (2nd Cir. 1993), cert. denied, 114 S.Ct. 2685 (1994). Indeed, "'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" Lindh, 161 Wis.2d at 346. However, the U.S. Supreme Court has also ruled that the right of cross-examine is not unlimited:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986). Thus it is said that "[t]he confrontation clause 'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.'" Id., quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294 (1985). "Furthermore, the denial of a defendant's opportunity to impeach a witness for bias and motivation to lie, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis." Bell, 778 F. Supp. at 174.

Under the foregoing principles, the question becomes whether or not the jury might have reasonably assessed Dr. Roberts' credibility and opinion differently had Lindh's defense counsel been permitted to pursue the line of questioning regarding the allegations of sexual misconduct. See Bell, 778 F. Supp. at 174. If the evidence Lindh hoped to bring out could not reasonably support the conclusion that Roberts was biased against Lindh or had an ulterior motive to render an opinion favorable to the prosecution's case, the Confrontation Clause was not violated. As stated earlier, the evidence Lindh hoped to bring out consisted of the facts contained in Lindh's voir dire of Roberts and the State's answers to Lindh's written discovery demands. That evidence clearly shows that, by the time Roberts was aware that the allegations of sexual misconduct had been referred to the District Attorney's office, the matter had already been transferred to a special prosecutor outside of Dane County. At that point, because the matter was already out of the hands of Dane County authorities, Roberts had no reason to believe that he would obtain some form of leniency in exchange for an opinion favorable to the prosecution in the Lindh case. The Court agrees wholeheartedly with the analysis of the Wisconsin Supreme Court in this regard:

> Clearly, up until July 8, 1988, there was no reasonable possibility for bias, motive or interest on the part of Dr. Roberts because until that date he did not know that any allegations had been referred to the Dane county district attorney's office. Because Dr. Roberts became aware of the immediate transfer of the matter to the special prosecutor at the same time, he had no reason to believe after July 8, 1988, that the Dane county district attorney's office would be in a position to prosecute him and thus possibly favor him in exchange for his testimony. Dane county was not in a position to make any "deals," reduce any charges, or even make any recommendation as to any criminal

> investigation or prosecution against Dr. Roberts and Dr. Roberts knew it. He therefore had no reason to favor the prosecutor in the instant case by testifying or giving a report favorable to him.
>
> The relationship between the Dane county district attorney's office and Dr. Roberts which would be necessary to suggest bias, interest or motive simply did not exist. The disclosure provided by the prosecutor upon the request of the defense and the voir dire of Dr. Roberts unequivocally showed the same thing. There is no reason whatsoever to conclude that there was fertile ground for even the seed of a "deal" to be sewn and to germinate under those circumstances. To suggest that Dr. Roberts' testimony would be influenced in favor of the prosecution under these circumstances amounts to mere speculation. There being no nexus between the future criminal investigation and prosecution of Dr. Roberts, if any were to be undertaken, and the Dane county district attorney's office, a jury could not reasonably find a logical connection between the two, because none existed.

Lindh, 161 Wis.2d at 350-51. Because the jury's assessment of Roberts' testimony could not reasonably have been altered by the excluded evidence, the trial court did not violate petitioner's 6th Amendment rights.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Lindh's petition is denied and the case dismissed.

APPENDIX C

161 Wis.2d 324

STATE of Wisconsin,
Plaintiff-Respondent-Petitioner,

v.

Aaron LINDH, Defendant-Appellant.

No. 89-0896-CR.

Supreme Court of Wisconsin.

Argued Jan. 25, 1991.

Decided April 17, 1991.

Defendant was convicted before the Circuit Court, Dane County, Robert R. Pekowsky, J., of two counts of first-degree murder, one count of attempted first-degree murder, committing acts alleged by using a dangerous weapon, and one count of carrying a firearm in a public building, and he appealed. The Court of Appeals, 156 Wis.2d 768, 457 N.W.2d 564, reversed and remanded. State petitioned for review. The Supreme Court, Steinmetz, J., held that: (1) trial court did not abuse its discretion in granting State's in limine motion to restrict impeachment of State's psychiatric witness during mental capacity phase of bifurcated trial, and (2) court did not abuse its discretion during mental capacity phase of trial in refusing to suppress statements taken from defendant by psychiatric witness within hours of defendant's arrest.

Reversed.

Shirley S. Abrahamson, J. dissented with opinion.

1. Criminal Law ⇐1170½(5)

Appellate court should reverse a trial court's determination to limit or prohibit a certain area of cross-examination offered to show bias only if trial court's determination represents a prejudicial abuse of discretion.

2. Criminal Law ⇐625.15

Trial court did not abuse its discretion during mental capacity phase of bifurcated murder trial in granting State's motion in limine precluding cross-examination of State's psychiatric witness concerning allegations of sexual misconduct by witness

with female patients; as allegations were not being investigated by prosecutor in murder case, but by special prosecutor, witness had no reason to favor prosecutor by testifying or giving report favorable to him; moreover, even if evidence concerning allegations could be considered marginally relevant to bias, motive or interest or to character or credibility of witness as an expert, risk of unfair prejudice from admission of the evidence far outweighed its probative value.

3. Criminal Law ⇐393(1), 396(1)

Right against self-incrimination does not apply to prohibit admission of testimony of a State psychiatric expert in circumstances where defendant already has interposed an insanity defense and has presented expert testimony in support of that defense. U.S.C.A. Const.Amend. 5; W.S.A. Const. Art. 1, § 8.

4. Criminal Law ⇐393(1)

Privilege against self-incrimination does not require exclusion of results of a psychiatric interview with defendant from mental capacity phase of a bifurcated trial on ground that psychiatrist did not comply with dictates of *Miranda*; psychiatric interview designed to ascertain a defendant's mental responsibility is not accusatory in nature, and *Miranda* warnings, which are aimed against involuntary self-incrimination, are not a prerequisite to such an interview or to admission of results of interview in mental capacity phase. U.S.C.A. Const. Amend. 5; W.S.A. Const. Art. 1, § 8.

5. Criminal Law ⇐393(1)

Assuming that *Miranda* was applicable to interview of defendant by State psychiatrist within hours of defendant's arrest, statements taken by psychiatrist were admissible despite defendant's claim that psychiatrist failed to scrupulously honor defendant's purported assertion of his right to remain silent which occurred when defendant indicated he did not want to discuss details of shootings; defendant's statement that he did not want to discuss details of shootings, standing alone, was not an invocation of the right to silence, where defendant did not say he did not want to answer additional questions, and did not ask psychiatrist to end the interview or go away; moreover, even if defendant did invoke his right to remain silent, psychiatrist scrupulously honored that right. U.S.C.A. Const. Amend. 5.

Sally L. Wellman, Asst. Atty. Gen., argued, Donald J. Hanaway, Atty. Gen., on the briefs, for plaintiff-respondent-petitioner.

Kenneth P. Casey, Chief, Appellate Div., argued, Keith A. Findley, Asst. State Public Defender, on a brief, for defendant-appellant.

STEINMETZ, Justice.

The principal issue in this case is whether the trial court abused its discretion by ruling in favor of the state's *in limine* motion to restrict defense impeachment of one of the state's psychiatric witnesses during the mental capacity phase of the bifurcated trial.

A second issue is whether the trial court abused its discretion during the mental capacity phase of the trial by refusing to suppress the use of statements taken from the defendant by a psychiatric witness within hours of the defendant's arrest.

With respect to the first issue, the court of appeals reversed the circuit court for Dane county, Judge Robert R. Pekowsky, holding that the trial court's order restricting defense impeachment of the state's psychiatric witness was an abuse of discretion and remanding the case for a new mental capacity phase of the trial. With respect to the second issue, the court of appeals affirmed the trial court's decision allowing the introduction of the defendant's statements.[1]

We reverse the court of appeals and hold that the trial court did not abuse its discretion in granting the state's motion *in limine*. We affirm that portion of the court of appeals decision which held that the trial court did not err by refusing to suppress

1. *State v. Lindh*, 156 Wis.2d 768, 457 N.W.2d 564 (Ct.App.1990).

the use of the statements challenged by the defense.

* * * * * *

The issues relate only to "phase II," the mental capacity phase of a bifurcated trial, pursuant to sec. 971.165, Stats. At phase I, the guilt phase of the trial, the defendant, Aaron Lindh, was charged with the following offenses: two counts of first-degree murder, contrary to sec. 940.01, Stats.; one count of attempted first-degree murder, contrary to secs. 939.32(1)(a) and 940.01; committing the acts alleged above while using a dangerous weapon, contrary to sec. 939.63(1)(a)2; and one count of carrying a firearm in a public building, contrary to sec. 941.235(1). Lindh pleaded guilty to the firearm and dangerous weapon charges and was found guilty of the other charges by a jury. At phase II of the trial, Lindh,[2] pursuant to sec. 971.15,[2] claimed he had a mental disease at the time of the crimes and so pleaded not guilty for that reason. The jury found that Lindh did not have a mental disease at the time of the crimes. Accordingly, a judgment of conviction was entered against Lindh on all charges.

The charges arose out of an incident occurring during the noon hour of January 15, 1988. Lindh was in the City–County Building in Madison, Wisconsin, to meet with officers of the Madison Police Department.[3] After talking with certain police officers, Lindh apparently left the building and went to his automobile parked nearby, in which he had a modified .22–caliber rifle. Lindh then re-entered the building and proceeded to walk into an office of the Dane County Sheriff's Department, hiding the rifle under the coat he was wearing. There, he summarily shot and killed Eleanor Townsend, a sheriff's department secretary, adn then shot and seriously injured Erik Erikson, a private citizen who was present for the purpose of paying a parking ticket. He then proceeded to the county coroner's office, where he shot and killed Clyde Chamberlain, the coroner. He then brandished the gun at a deputy sheriff, advanced on the officer and challenged the officer to shoot and kill him. Lindh was shot, disabled and transported to Madison Meriter Hospital where he underwent surgery. After surgery, Lindh was taken to the hospital's intensive care unit where he remained through the evening.

Late in the afternoon of the shootings, Dane County Assistant District Attorney John Burr retained Dr. Leigh Roberts, whom Burr considered "one of the best forensic psychiatrists around." Dr. Roberts was informed of the shootings. He was told that Lindh had been taken into custody, that questions might be raised regarding Lindh's mental state during the shootings, and that he might be requested to interview Lindh in this connection.

That evening, shortly after 8:30 p.m., two detectives from the Madison Police Department visited Lindh in the intensive care unit. They identified themselves to Lindh as police officers and indicated that they wanted to talk with him about the shootings in the City–County Building earlier that day. The detectives fully advised Lindh of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)[4], which rights he

2. Section 971.15, Stats., provides as follows:

Mental Responsibility of defendant. (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

(2) As used in this chapter, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

3. The meeting evidently was either for the purpose of discussing the department's progress concerning its investigation of two burglaries of Lindh's apartment that had occurred during the previous week or for the purpose of discussing the imminent disposition of a charge Lindh was facing.

4. *See State v. Hernandez*, 61 Wis.2d 253, 257, 212 N.W.2d 118 (1973), in which these rights are set forth and discussed.

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waived. The detectives questioned Lindh for approximately 35 minutes.

At 9:00 p.m. that evening, the district attorney's office contacted Dr. Roberts at his home and requested that he interview Lindh that same evening. Dr. Roberts agreed to do so and arrived at Lindh's bedside at 9:33 p.m. He explained to Lindh that Assistant District Attorney Burr had sent him and indicated that the interview was taking place "at the request of the District Attorney's office." Before beginning his interview of Lindh, Dr. Roberts essentially reiterated to him all of his *Miranda* rights, except that he did not inform him that before any interview an attorney would be provided to him at county expense if he wanted and could not afford one. Dr. Roberts also informed Lindh that the purpose of his interview related to assessing Lindh's mental state at the time of the shootings. Lindh did nothing to suggest that he was not disposed to such an interview.

Dr. Roberts began to question Lindh, asking him if he could recall what happened earlier that day in the City–County Building. Lindh said he had a limited amount of recall but described shooting two men and a woman. When asked why he shot them, Lindh responded that he did not know. When asked if he cared to discuss the details of the shootings, he answered in the negative. At that point, Dr. Roberts suggested to Lindh that he might not want to talk with him at all, since Lindh did not have an attorney present. "Well," Dr. Roberts said to Lindh, "I'll wait a few minutes and come back and talk with you again." Dr. Roberts then left the defendant alone because, in his words:

> I wanted to be very sure that he understood, really, the purpose of my being there, and that he understood his rights in relation to anything that he might share with me, because, in general, I'd much prefer that he have an attorney prior to that time, and that his attorney be aware that he was talking with me.

Twelve minutes later, Dr. Roberts returned to Lindh's bedside. Before talking with Lindh, Dr. Roberts again generally informed him of his rights concerning the interview. Lindh responded that he understood he did not have to talk with Dr. Roberts and understood why Dr. Roberts was with him. Lindh again affirmed that he understood that anything said would not be confidential. Again, Dr. Roberts suggested to Lindh that he might want to have an attorney before he talked. Lindh indicated, however, that he would talk with Dr. Roberts.

Dr. Roberts proceeded to question Lindh about the shootings as well as about his personal and family background. Lindh again indicated that he shot three human beings, none of whom he knew personally, that day at the City–County Building. He also spoke of two burglaries of his apartment that had taken place within the past week, the second occurring on the eve of the shootings. In addition, he indicated that he was dissatisfied and angry after the meeting he had with police at the City–County Building some minutes prior to the shootings. In response to questions from Dr. Roberts concerning his recent and current mental state, Lindh indicated that he was not suicidal, that he did not have significant depression, that he was not experiencing hallucinations, hearing voices or seeing visions, and that he had not been experiencing any significant eating or sleeping problems. Dr. Roberts later testified to his opinion that Lindh, based upon his ability to converse, absence of slurred speech, and responsive answers to specific questions the nature of which is indicated above, was able to understand what was taking place and being said at the interview. Dr. Roberts stopped the interview at about 10:25 p.m., when Lindh indicated he was experiencing some pain.

On February 26, 1988, Lindh was arraigned and entered his pleas of not guilty and not guilty by reason of mental disease. At the request of the district attorney, the court appointed Dr. Roberts and Dr. Frederick Fosdal, another forensic psychiatrist, to examine the defendant on behalf of the state.

On March 8, 1988, Dr. Roberts became aware of allegations of professional misconduct against him. Specifically, he became aware that the University of Wisconsin Hospital was investigating an allegation that he had engaged in sexual misconduct with a female patient. He gave no particular thought at the time to the fact that there was a potential for a criminal charge to be made against him and that such a charge could involve the Dane County District Attorney's office. However, he generally knew at the time about the existence of a state law which could subject him, as a therapist, to criminal penalties if such an allegation as that made against him were true.[5] He was not aware of what penalty could be prescribed if he were charged and convicted. He presumed that, were any prosecution to be carried out, it would happen in Dane county, where the allegations were made and therefore would be conducted by the Dane county district attorney's office.

In May 1988, Dr. Roberts learned that the Medical Examining Board was also investigating allegations of sexual misconduct by him with three female patients after the examining board made a request of him to provide it with records.

Dr. Roberts interviewed Lindh again on June 22, 1988, at the Dane county jail. The next day, June 23, University of Wisconsin Hospital attorneys met with Dane County District Attorney Hal Harlowe and referred to him the allegations against Dr. Roberts. At the same meeting, Harlowe informed those attorneys that he would transfer the matter to a special prosecutor. After the meeting, Harlowe immediately undertook to transfer the matter to the office of Milwaukee County District Attorney E. Michael McCann so as to establish that office as special prosecutor in the matter.

The Dane county district attorney's office sought this transfer in light of the fact that it had worked closely with Dr. Roberts on the prosecution of a number of past and pending cases. The district attorney's office considered that that relationship could constitute a conflict of interest for both Dr. Roberts and the district attorney's office if it were to investigate or prosecute Dr. Roberts. The Dane county circuit court officially appointed the Milwaukee county district attorney's office as special prosecutor on June 28 or 29, 1988.

Dr. Roberts was never contacted by any member or representative of the Dane county district attorney's office, nor was he contacted by any police officer, concerning the allegations against him. Nor did anyone from the Dane county district attorney's office have any contact with Dr. Roberts' attorney about the allegations. Not until July 8, 1988, did Dr. Roberts become aware, through his attorney, that allegations had been referred to the Dane county district's office; at the same time, he became aware that the special prosecutor already had been appointed.

No formal or informal decision was made by the Dane county district attorney's office as to whether any criminal investigation or charges should be made against Dr. Roberts prior to the appointment of the special prosecutor. No one from the Dane county district attorney's office had any contact with the special prosecutor or discussed the matter with the special prosecutor after the special prosecutor appointment.

On August 17, 1988, Dr. Roberts submitted a report concluding that Lindh was not suffering from a mental disease or defect at the time of the shootings. On August 22, 1988, he interviewed Lindh for the last time.

On September 7, 1988, the defense filed a "Specific Demand for Exculpatory Evidence" regarding the complaint against Dr. Roberts before the Medical Examining Board. The complaint was attached to the discovery demand in which the defense set forth a list of specific questions to be answered, including questions as to when Dr. Roberts first became aware that the allegations had been made; when he was first aware the allegations could result in crimi-

5. Specifically, sec. 940.22, Stats., provides criminal penalties for the sexual exploitation of a patient or client by a therapist.

nal charges; when the allegations were referred to the Dane county district attorney's office; when a special prosecutor was appointed, when Dr. Roberts became aware of this; and whether the Dane county district attorney's office had made any decision as to whether charges should be filed.

The state promptly responded to the demand, denying that any of the material requested was exculpatory but fully answering each and every question set forth by the defense.[6] The state also filed, on September 12, 1988, a motion *in limine* requesting that the trial court prohibit any cross-examination of Dr. Roberts concerning the allegations of misconduct pending against him or concerning any ramification of those pending allegations, including but not limited to the status of Dr. Roberts' hospital privilege at the University of Wisconsin Hospital. The motion asserted that any such inquiry by the defense would be "totally irrelevant and immaterial to the issues" before the court.

A hearing on the state's motion was held on September 13, 1988. At that hearing, the defense acknowledged that the state had fully complied with its discovery demand. It also indicated it was alleging no wrongdoing or bad faith on the part of the prosecution. The parties argued the merits of the state's motion, the defense arguing that the circumstances raised serious questions relating to the bias, motive and interest of Dr. Roberts. The defense also argued more generally that Lindh should be permitted to explore the credibility of Dr. Roberts as an expert witness. In this connection, the defense, although it had no support in the record upon which to base its position, asserted that University of Wisconsin Hospital had temporarily suspended Dr. Roberts' privilege to treat patients at that institution after conducting its own investigation. Lindh argued that he should be permitted, during his own questioning on Dr. Roberts' qualifications, to question Dr. Roberts concerning the allegations against him and his purported suspension so that the prosecution would not be able to present Dr. Roberts as "pure as the driven snow."

The state argued that the allegations contained in the board's complaint were not relevant to the issues of bias, motive or interest. The state argued that the allegations did not go to bias because when Dr. Roberts was retained and appointed, the prosecution was not looking to him for any particular result from his evaluation of Lindh but simply his professional opinion. In this regard, the state noted that some five weeks prior to the filing of his report Dr. Roberts was aware that a special prosecutor had been appointed and that the Dane county district attorney's office had absolutely no involvement with the case. The prosecutor argued it was too implausible to think Dr. Roberts would file a report with the hope that it would help him in Dane county when he knew that the matter was under Milwaukee county jurisdiction. Even if the proffered evidence were marginally relevant, the state said, it would be extremely prejudicial and cause the jury to focus on an issue unrelated to the question of Lindh's mental capacity at the time of the shootings, and therefore should not be allowed.

Concerning the defense's more generally stated line of inquiry as to Dr. Roberts' character or credibility as an expert witness, the state responded that an expert witness should be treated like any other witness and that there was no basis to question Dr. Roberts about the allegations. The state argued that cross-examination pertaining to the allegations of sexual misconduct and purported hospital suspension would serve no purpose insofar as those matters did not reflect on Dr. Roberts' qualifications as an expert witness. Such cross-examination, the prosecution said, would serve only to "trash" Dr. Roberts, to put him on trial and draw the issue away from the mental responsibility of Lindh.

Following extensive arguments by the parties, the trial court, after having "given a lot of thought to this," found the proffered evidence to be "irrelevant and immaterial." Rejecting the defense's theories of relevancy, the trial court expressly considered that, particularly given that the matter of the allegations against Dr. Roberts was transferred "almost instantaneous[ly]" out of the Dane county district attorney's office to the office of the special prosecutor, there was no possibility of bias, motive or interest on the part of Dr. Roberts. "I do not find anything in this record which would support or permit counsel to inquire as to [that issue]," the court said. The trial court added:

> And I think it's fair to say that, no matter what [Dr. Roberts does] for the Dane county district attorney's office, [he] would not be able to influence any result, as a result of [the special prosecutor's] investigation or any judge that might ultimately hear it, should there be any criminal charges filed.

Even though it had already found the proffered evidence not relevant, the trial court apparently assumed for the sake of argument that the proffered evidence might be at least marginally relevant such that it should be "balanced" against the risk of unfair prejudice so as to determine its admissibility pursuant to sec. 904.03, Stats. In conducting its balancing test, the trial court found that the risk of unfair prejudice to the state would outweigh any relevance. The court expressly noted that the allegations against Dr. Roberts were nothing more than allegations and said that there was the risk that the jury would think that "if there's smoke, there's fire." Thus, the court held that cross-examination pertaining to the allegations against Dr. Roberts and his purported hospital suspension was not admissible. The court therefore granted the motion *in limine*.

At the same time, the court gave defense counsel the right to *voir dire* Dr. Roberts outside the presence of the jury, and a *voir dire* hearing took place before Dr. Roberts testified at phase II of the trial. The hearing essentially amounted to a reiteration by Dr. Roberts of much of the information contained in his response to Lindh's discovery demand. In addition, Dr. Roberts stated at the hearing that when he was first called into the case by Assistant District Attorney Burr he was not aware that any allegations against him were threatened. He also stated that he was not aware that District Attorney Harlowe had met with University of Wisconsin Hospital attorneys until the date of the hearing. The defense did not dispute these statements by Dr. Roberts. Based upon the *voir dire* hearing, the trial court found no basis to alter its ruling granting the motion *in limine*.

At phase II, Dr. Ezra Griffith, a forensic psychiatrist, testified for the defense. After giving a lengthy introduction as to his professional qualifications and background, Dr. Griffith testified to a reasonable degree of medical certainty that on the day of the killings the defendant was in a psychotic state which he diagnosed as a "brief reactive psychosis," and that as a result of that psychotic state Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct and lacked substantial capacity to conform his conduct to the requirements of law. He also testified to a reasonable degree of medical certainty that Lindh had been suffering from mental diseases or disorders long before January 15, 1988. He characterized these long-term disorders as "mixed personality disorder."

The principal expert witness for the state was Dr. Roberts. At the outset of his testimony, Dr. Roberts indicated that he was: a faculty member at the University of Wisconsin Medical School; "on the adjunct faculty at San Francisco Theological Seminary;" chairperson of conferences "relating to religion and mental health;" previously "honored ... as essentially the mid-west psychiatrist of the year;" and, a grandfather. Dr. Roberts proceeded to give his opinion that the defendant did not suffer a mental illness at the time of the crimes, that a personality disorder is not a mental disease, and that a conduct disorder is not a mental disease. He testified to his opinion that the defendant was not suffering a brief reactive psychosis at the time of the offenses. He gave his opinion that the defendant knew his conduct was wrong and that he could conform his conduct to the requirements of the law.

6. The information contained in the state's answers, entirely undisputed by the defense, is incorporated within this factual portion of this opinion.

The state also called Dr. Fosdal who stated that he diagnosed Lindh as suffering a mixed personality disorder. He testified, however, that such a disorder does not prevent one from appreciating the wrongfulness of his conduct or from conforming his conduct to the requirements of the law. He testified to his opinion that the defendant did not suffer a brief reactive psychosis at the time of the crimes, did not have a mental disease, and suffered no impairment of his ability to conform his conduct to the requirements of the law.

* * * * * *

With respect to the first issue, Lindh contends that the evidence he wished to show on cross-examination of Dr. Roberts was wrongfully excluded to the extent it might have shown bias on the part of Dr. Roberts, who, facing the possibility of a criminal investigation and criminal charges, allegedly might have wanted to curry favor with the prosecutor by reporting a diagnosis of Lindh's mental state that would favor the prosecution against Lindh. Lindh also asserts more generally that the evidence was relevant to Dr. Roberts' character and credibility.

The confrontation clause of the Sixth Amendment of the United States constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." By virtue of the fourteenth amendment, this right is applicable to the citizens of this state. Article I, sec. 7 of the Wisconsin constitution essentially provides the same right, indicating that an accused has a right to meet his witnesses "face to face." "'"The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*"'" *Van Arsdall*, 475 U.S. 673, 1431, 1435, 89 L.Ed.2d 674 (*Davis v. Alaska*, 415 U.S. 3(S.Ct. 1105, 1110, 39 L.Ed.2d 3 phasis in original). "'[T]he witness' motivation in testifyi and important function of the ally protected right of cross-e *Id.* at 678–79, 106 S.Ct. at 14

Nevertheless:

> [T]rial judges retain wide lat as the Confrontation Clause to impose reasonable lim cross-examination based about, among other things, prejudice, confusion of th witness' safety, or interro repetitive or only margina

Id. at 679, 106 S.Ct. at 1435. tation clause "'guarantees a for effective cross-examina examination that is effecti way, and to whatever exten might wish.'" *Id.*, *quoti Fensterer*, 474 U.S. 15, 20 294, 88 L.Ed.2d 15 (1985) (E inal).

Wisconsin evidence law these fundamental precept relevant, as defined by se it is admissible, unless would be prohibited by ar constitutions of the Unit consin. Section 904.02, admissible, evidence may probative value is substa by other factors, includi prejudice. Section 904.[08.[10] pertains specifical character and conduct

7. Section 904.01, Stats., provides:
   'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
8. Section 904.02, Stats., provides:
   All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.
9. Section 904.03, Stats., p
   Although relevant, ev ed if its probative val weighed by the dang confusion of the iss jury, or by consider waste of time, or n cumulative evidence.
10. Section 906.08, Stat
    Evidence of chara ness. (1) OPINION DENCE OF CHARA

"The criterion of relevancy is whether the evidence sought to be introduced would shed any light on the subject of inquiry." *Rogers v. State*, 93 Wis.2d 682, 688, 287 N.W.2d 774 (1980). In *Rogers*, we also said that:

> The proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony.

Id. at 689, 287 N.W.2d 774. The scope of cross-examination is not limited to the scope of the direct examination. *Id.* However, to be relevant, the proffered evidence must have a logical or rational connection with the fact sought to be provided. *State v. Williamson*, 84 Wis.2d 370, 384–85, 267 N.W.2d 337 (1978). There must be a reasonable relation between the evidence sought to be introduced and the proposition to be proved before the cross-examination will be allowed. *Rogers*, 93 Wis.2d at 691, 287 N.W.2d 774.

[1] We previously have noted that evidentiary determinations are a matter of trial court discretion. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983); *Rogers*, 93 Wis.2d at 689, 287 N.W.2d 774. This discretion of the trial court is broad. *State v. Oberlander*, 149 Wis.2d 132, 140, 438 N.W.2d 580 (1989). The appellate court should reverse a trial court's determination to limit or prohibit a certain area of cross-examination offered to show bias only if the trial court's determination represents a prejudicial abuse of discretion. *Williamson*, 84 Wis.2d at 384–85, 267 N.W.2d 337); *State v. Whiting*, 136 Wis.2d 400, 422, 402 N.W.2d 723 (Ct.App.1987). In *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981), this court stated:

> It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

See also Oberlander, 149 Wis.2d at 140–41, 438 N.W.2d 580. No abuse of discretion will be found if a reasonable basis exists for the circuit court's determination. *Oberlander*, 149 Wis.2d at 141, 438 N.W.2d 580.

[2] We hold that the trial court did not abuse its discretion in determining that the proffered evidence was not relevant to show bias, motive or interest or more generally the character or credibility of Dr. Roberts as an expert witness. The court of appeals erred in substituting its discretion for that of the trial court.

In reaching its decision, the court of appeals concluded Lindh should have been allowed to cross-examine Dr. Roberts "as to the fact that allegations of misconduct were pending against him and the serious effect upon his profession and livelihood if he were convicted of the charges alleged" and that Lindh should have been allowed to inquire "whether, during the period in question, he was investigated with respect to possible criminal conduct which, upon conviction, would have serious professional and persunal consequences." This conclusion ignores the fact that the trial court

> ed in s. 972.11(2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: a) the evidence may refer only to character for truthfulness or untruthfulness, and b), except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crimes as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.
>
> (3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

had a reasonable basis to conclude that the proffered evidence simply was not in any way relevant.

From the time Dr. Roberts first interviewed Lindh in the hospital on January 15, 1988, through the times that he interviewed him in June 1988 and August 1988 and up through and including September 1988, there is no evidence in the record that a criminal investigation was being conducted —or, indeed, that one ever was conducted—regarding any allegations against Dr. Roberts. At most, it is known that the matter of the complaints by Dr. Roberts' patients against him was referred to the Dane county district attorney's office in June and that the matter was immediately transferred to the Milwaukee county district attorney's office for any investigation it would choose to pursue and any prosecution it would choose to conduct. There is no evidence that after that time and as of the time of trial, the Milwaukee county district attorney's office ever began any criminal investigation.[11]

Clearly, up until July 8, 1988, there was no reasonable possibility for bias, motive or interest on the part of Dr. Roberts because until that date he did not know that any allegations had been referred to the Dane county district attorney's office. Because Dr. Roberts became aware of the immediate transfer of the matter to the special prosecutor at the same time, he had no reason to believe after July 8, 1988, that the Dane county district attorney's office would be in a position to prosecute him and thus possibly favor him in exchange for his testimony. Dane county was not in a position to make any "deals," reduce any charges, or even make any recommendation as to any criminal investigation or prosecution against Dr. Roberts and Dr. Roberts knew it. He therefore had no reason to favor the prosecutor in the instant case by testifying or giving a report favorable to him.

The relationship between the Dane county district attorney's office and Dr. Roberts which would be necessary to suggest bias, interest or motive simply did not exist. The disclosure provided by the prosecutor upon the request of the defense and the *voir dire* of Dr. Roberts unequivocally showed the same thing. There is no reason whatsoever to conclude that there was fertile ground for even the seed of a "deal" to be sewn and to germinate under these circumstances. To suggest that Dr. Roberts' testimony would be influenced in favor of the prosecution under these circumstances amounts to mere speculation. There being no nexus between the future criminal investigation and prosecution of Dr. Roberts, if any were to be undertaken, and the Dane county district attorney's office, a jury could not reasonably find a logical connection between the two, because none existed. Thus, it was not an abuse of discretion not to allow the matter to be brought up on cross-examination.

Analogous decisions from other jurisdictions support our conclusion. In *Gutierrez v. State*, 681 S.W.2d 698, 706–07 (Tex.Ct. App.1984), the court held it was not an abuse of discretion to prohibit cross-examination of a state witness on pending charges under circumstances where the county attorney, not the district attorney prosecuting the defendant's case, had authority over the witness's pending charges; no deals had been made with the witness; nobody in the district attorney's office had suggested lenient treatment and there was no evidence elicited at the *voir dire* of the witness which suggested he had a self-interest in his testimony.

Similarly, in *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985) (en banc), the court held that it was not unreasonable to refuse to allow the defendant to cross-examine a state witness on a pending contempt charge. The county attorney prosecuting the case in which the witness was to testify was not involved in the pending contempt charge. A special, independent prosecutor had full responsibility for the contempt

11. An investigation of Dr. Roberts eventually was undertaken by the special prosecutor who brought charges against Dr. Roberts. Dr. Roberts pleaded no contest to these charges. Although the record does not indicate the exact dates of these events, it is clear that they all occurred subsequent to Dr. Roberts' testimony at phase II of Lindh's trial.

charges. Thus, the court held that the pending charge "would not have indicated that [the witness's] testimony was colored by any hope of lenient treatment from the County Attorney." 145 Ariz. at 533, 703 P.2d at 477.

These cases stand for the proposition that, where a witness is himself subject to a prosecution by those who are separate and distinct from those who have called him as a witness, there is no reasonable basis to believe the witness has a motive to curry favor or hope for leniency by virtue of his testimony. This clearly is the situation in the instant case. Because of the fact that any prosecution by the special prosecutor against Dr. Roberts at some point in the future was merely a possibility, there was no reasonable basis to believe that Dr. Roberts would color his report or testify to some sort of bias, motive or interest. As courts have indicated, cross-examination for bias is not opportune when there exists the mere possibility of future or potential charges. *See generally, State v. Grasso*, 172 Conn. 298, 374 A.2d 239, 242 (1977); *People v. Simmons*, 99 Ill.App.3d 519, 54 Ill.Dec. 951, 955, 425 N.E.2d 1168, 1172 (1981). It is not even the case that, as a psychiatric professional, Dr. Roberts was called upon to "rise above" influences that might lead to bias, motive or interest on his part, for no such influences ever existed.

The cases upon which Lindh relies in this regard[12] stand in sharp contrast to the situation in the case at bar, although the defendant presents them for the broad proposition that a witness may be cross-examined about the threat of criminal prosecution and not just about pending charges. In the cases offered by Lindh, the evidence had a direct and immediate nexus to bias, motive to testify falsely or motive to favor the prosecution. The cases involved actual or pending criminal charges or a direct and immediate ongoing criminal investigation or imminent threat of criminal charges by a government agent directly involved in the case in which the witness was to testify. In the case at bar, there were no pending criminal charges. There was no ongoing criminal investigation. If a criminal investigation were undertaken and charges were brought in the future, those charges would be brought by the special prosecutor, not by the Dane county district attorney's office.

Certain cases cited by Lindh generally evidence what the United States Supreme Court in *Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, called a "prototypical form of bias." In *Van Arsdall*, the trial court prohibited any cross-examination on the fact that the state had dropped a public drunkenness charge, actually filed, in exchange for the witness's promise to speak with the prosecutor about a murder. The Supreme Court held that the total prohibition of all inquiry into this "prototypical form of bias" violated the defendant's constitutional right of confrontation by "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* at 679–80, 106 S.Ct. at 1435.

Although *Van Arsdall* did not specifically define "prototypical form of bias," the context of the case makes it clear that the court was referring to a situation in which a witness might have or realistically perceive an interest in testifying so as to favor the prosecution. For example, in *Van Arsdall*, the witness was in a position to and actually did testify in exchange for reduction in charges or sentence.

Other cases cited as persuasive by Lindh manifest a comparable prototypical form of bias. In *Davis v. Alaska*, 415 U.S. 308, 316–18, 94 S.Ct. 1105, 1110–11, 39 L.Ed.2d 347 (1974), the juvenile witness was on probation and thus distinctly "vulnerable," as the Supreme Court described it, to influences which might raise questions of biases, ulterior motives and prejudices that "relate directly to issues or personalities in the

12. Lindh relies upon *Cowheard v. State*, 365 So.2d 191 (Fla.Dist.Ct.App.1978); *State v. Chesnut*, 621 P.2d 1222 (Utah 1980); *United States v. Hutchmon*, 609 F.2d 1092 (5th Cir.1979); *Burr v. Sullivan*, 618 F.2d 583 (9th Cir.1980); *United States v. Onori*, 535 F.2d 938 (5th Cir.1976); and *Greene v. Wainwright*, 634 F.2d 272 (5th Cir. 1981).

case at hand." Specifically, because of his probationary status, the witness might have been effectively encouraged to make a faulty initial identification of the defendant in order to shift suspicion away from himself as to the same incident, and he also might have been subject to undue pressure from the police and made his initial identifications under fear of possible probation revocation. *Id.* at 311, 317, 94 S.Ct. at 1107, 1111. This in turn could have affected his later in-court identification. *Id.* at 317, 94 S.Ct. at 1111.[13]

There was also a prototypical form of bias evident in *State v. Lenarchick*, 74 Wis.2d 425, 247 N.W.2d 80 (1976), where charges were pending against the witness. Prior to trial, one charge was dropped and two charges against the witness were being held open. Addressing the problem as one of constitutional dimension, the court said that:

> When a witness has been criminally charged by the state, he is subject to the coercive power of the state and can also be the object of its leniency. The witness is aware of that fact, and it may well influence his testimony.

Id. at 447–48, 247 N.W.2d 80. Under such circumstances, this court held, "[a] defendant, as an ingredient of meaningful cross-examination, must have the right to explore the subjective motives for the witness' testimony." *Id.* at 448, 247 N.W.2d 80.

In *State v. Balistreri*, 106 Wis.2d 741, 317 N.W.2d 493 (1982), a prototypical form of bias was effectively accorded proper exposure at trial. The witness had been arrested for criminal acts resulting in plea negotiations which reduced the witness's potential sentence from 105 to 40 years. In ruling that the trial court properly excluded testimony as to the factual details of prior criminal acts of the witness, the nature and number of which were already made known to the jury by the witness on direct examination, the court said that:

> 'The main objective [of allowing cross-examination pertaining to a witness' criminal acts and plea negotiations] is to show that the witness may have expected leniency or immunity from prosecution if he gave testimony in favor of the state, and it is necessary to show the commission of wrongful acts in order to establish the basis for such an expectation.'

Id. at 753, 317 N.W.2d 493, *quoting Lenarchick*, 74 Wis.2d at 447, 247 N.W.2d 80. Thus, while the cross-examination properly could have included inquiry into the general existence of the plea negotiations and the criminal acts to which the negotiations were related, such was not the case with respect to the factual details of the prior criminal acts of the witness in *Balistreri*, because they would not show that the witness may have expected leniency or immunity in exchange for his testimony.

In cases where there exists a prototypical form of bias, the possibility of bias, motive and interest of the witness is particularly distinct and immediate. The witness has an ongoing, dual relationship with the prosecutory actors. On the one hand, the witness as such is being of some service to the prosecution by giving his testimony; on the other hand, his status with respect to the same prosecution is "vulnerable." Criminal process of some sort against the witness, even if only at its initial stages, is a reality. Usually, it is being carried out by the prosecuting attorneys who are depending on his service as a witness; at the very least, it is being carried out in the same jurisdiction as the one in which the witness is offering his testimony. Under such circumstances, there usually is a reasonable inference that the witness is or considers himself to be in a position of being effectively more or less "vulnerable" to factors that could influence his testimony. The witness's acts, relationship or situation with respect to the state might be likely to produce at least a strong suspicion of bias, motive and intent in the eyes of a jury. A jury might reasonably have found the evidence "furnished the witness a motive for favoring the prosecution in his testimony." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435.

13. In this regard, the United States Supreme Court noted that "'[a] *partiality* of mind at some *former time* may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying.'" *Id.* n. 5 (Emphasis in original). While the defendant in the case at bar might have attempted to use this statement to argue that Dr. Roberts might have had a meaningful "partiality of mind at some former time" comparable to that envisaged by the Supreme Court in *Davis*, such an argument would be a manifestly unreasonable one. There is absolutely nothing in the record to suggest any reasonable possibility that Dr. Roberts ever held any bias, motive or interest that conceivably might have affected his testimony.

Lindh does not expose a "prototypical form of bias." Here, the prosecution had not dropped any pending criminal charges against Dr. Roberts, no charges had been reduced or favorably disposed, and Dr. Roberts was not on parole or probation or in custody. There was only the possibility that allegations of sexual misconduct with patients could form the basis of criminal charges. There is not even any claim that a criminal investigation was actually being conducted. Because substantial steps were taken immediately by the Dane county district attorney's office to appoint the special prosecutor upon the referral of the investigation of Dr. Roberts to the district attorney's office, Dr. Roberts had no "prototypical" bias, interest or motive to curry favor with the Dane county district attorney's office which was prosecuting Lindh, because any charges that would be brought against Roberts would be brought by the special prosecutor.

Although the basis of Lindh's other theory of relevancy is not altogether clear, it appears to proceed from a view that the exclusion of the proffered evidence is error because, as he describes it, the state was allowed to present Dr. Roberts as if his character was "pure as the driven snow." Noting that, at the start of his testimony, Dr. Roberts introduced himself as a grandfather, a faculty member at a theological seminary, the chairperson of conferences on religion and mental health, and as recipient of an award essentially naming him "midwest psychiatrist of the year," Lindh apparently argues that the mention of such facts in front of the jury entitled him to the particular cross-examination of Dr. Roberts that he desired. Again, we find that the trial court did not abuse its discretion in finding the proffered evidence "irrelevant and immaterial."

The character of a witness may be impeached only in regard to matters which go directly to his reputation for truth and veracity. *Barren v. State*, 55 Wis.2d 460, 461–66, 198 N.W.2d 345 (1972). We have long considered that on cross-examination into the character of a witness, use of irrelevancies, insinuating that a person is of bad moral character, tending to degrade him in the eyes of the jury, is not a proper impeachment device. *Banas v. State*, 34 Wis.2d 468, 474, 149 N.W.2d 571, *cert. denied* 389 U.S. 962, 88 S.Ct. 346, 19 L.Ed.2d 373 (1967). Virtually by definition, such evidence is not relevant, tending only to prejudice the jury against the witness.

The fact that Dr. Roberts may have engaged in professional misconduct and may have been subject to disciplinary measures as a result would not tend to make more or less likely the accuracy and correctness of his diagnosis and professional opinion in this case. The proffered evidence does not have any reasonable tendency to show Dr. Roberts was less qualified to examine and diagnose Lindh and render an opinion as to Lindh's mental capacity and no reasonable jury could so find. Nor would the cross-examination have cast light on Dr. Roberts' character for truthfulness and untruthfulness. The subjects that Lindh wished to discuss on cross-examination were completely unrelated to Dr. Roberts' truthfulness and abilities as an expert witness.

Far from presenting himself as "pure as the driven snow," as the defense asserts he did, Dr. Roberts simply testified to his past experience and professional background, as do all expert witnesses. The fact that he offered certain innocuous family information without objection from the defendant does not mean that Lindh had a right to cross-examine on the matter of the sexual misconduct allegations.

Dr. Roberts' introduction was qualitatively no different from that of defense psychiatric expert Dr. Griffith, who testified he was: acting director of Connecticut

Mental Health Center in New Haven, Connecticut, and was associate professor of psychiatry at Yale University School of Medicine and an associate professor in the Department of Afro-American studies at Yale. Dr. Griffith also testified that he went to Harvard University, took his medical degree at University of Strasburg in France, did residency at the Albert Einstein College of Medicine in New York, that he has a specialty certification in psychiatry and forensic psychiatry, that he teaches a course in the department of Afro-American studies that has to do with the psychological dimensions of black autobiographies, that he is a consultant to the Pan American National Health Organization, Project Hope, and the Commission of Security and Cooperation in Europe of the United States Congress, that he is editor of Black Psychiatrists of Americans Quarterly, that he is on the executive committee of the Black Psychiatrists of America, that he was honored by a fellowship of American Psychiatric Association and received a traveling fellowship from the Solomon Fuller Institute, that he serves on various boards, and that he has authored a number of articles.

Numerous cases have held that allegations of professional wrongdoing, misconduct or negligence that is unrelated to the case on trial is not a proper subject of impeachment of an expert medical witness. In *State v. Paradise*, 213 Conn. 388, 567 A.2d 1221, 1229–30 (1990), inquiry on cross-examination into a prior investigation of official misconduct by the witness in his prior position as chief medical examiner of New York City would have been of dubious relevance and, moreover, would have led to a mini-trial on the circumstances of unrelated cases. In *Downey v. Weston*, 451 Pa. 259, 301 A.2d 635, 639 (1973), the court held that it was not an abuse of discretion or an error of law for the court to bar cross-examination of a medical expert witness to establish that he had misconducted himself by failing to observe a principle of medical ethics. In *Noble v. Lansche*, 735 S.W.2d 63 (Mo.Ct.App.1987), it was held reversible error for the trial court to allow an expert witness in a medical malpractice case to be cross-examined on his voluntary surrender of his license to dispense controlled narcotics, due to his own drug problem. The court held the expert's former drug problem was unrelated to his skill, knowledge and qualifications to express an expert opinion in the case; neither the drug abuse nor the surrender of his license affected his qualification as an expert witness or his credibility. The only purpose of such evidence could be to cause disparagement over the expert's testimony by reason of irrelevant misconduct.

See also Schneider v. Revici, 817 F.2d 987 (2d Cir.1987) (fact that an expert witness's license has been temporarily suspended pending an investigation); *Downey v. Weston*, 451 Pa. 259, 301 A.2d 635 (1973) (expert's failure to observe a principle of medical ethics); *Sanchez v. Bay General Hospital*, 116 Cal.App.3d 776, 172 Cal.Rptr. 342 (1981) (question why doctor did not have privileges at certain hospitals); *Miceikis v. Field*, 37 Ill.App.3d 763, 347 N.E.2d 320 (1976) (prior malpractice litigation); *see also Pyle v. Morrison*, 716 S.W.2d 930 (Tenn.Ct.App.1986).

The trial court, even after finding the proffered evidence irrelevant, went on to assume, apparently for the sake of argument, that the evidence was relevant, analyzing the problem pursuant to sec. 904.03, Stats.[14] It then found that any relevance

14. Apparently because in conducting this balancing test the trial court did not explicitly refer to sec. 904.03, Stats., and did not expressly state that it would engage in "balancing," Lindh has suggested that the trial court failed to exercise its discretion. Because a trial court's failure to exercise discretion constitutes an outright abuse of discretion, *State v. Hutnik*, 39 Wis.2d 754, 764, 159 N.W.2d 733 (1968), we would reverse the trial court if Lindh's argument were meritorious. However, we find that it is not meritorious.

The fact that the trial court did not expressly state the name of sec. 904.03, Stats., or use the words "weighing" or "balancing" or some similar word or words to describe its analysis, does not mean, that the court failed to exercise its discretion. We do not recognize such a "magic words" argument.

If anything, a trial court's failure to generally refer to its sec. 904.03, Stats., balancing tests might under certain circumstances constitute a "fail[ure] to set forth its reasoning." *See Pharr*, 115 Wis.2d at 343, 340 N.W.2d 498. Where the

was outweighed by the risk of unfair prejudice from admission of the evidence. We find that the trial court was well within its discretion in that finding. Even if the proffered evidence could be considered marginally relevant to bias, motive or interest or to the character or credibility of Dr. Roberts as an expert, it was reasonable to conclude that the risk of unfair prejudice from admission of the evidence far outweighed the probative value of the evidence, and the cross-examination could have been properly prohibited for that reason.

As the Supreme Court said in *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435, bias evidence which is only marginally relevant or which may confuse the issues is excludable. As stated in *Williamson*, 84 Wis.2d at 384–85, 267 N.W.2d 337, evidence which is relevant to provide bias, like evidence offered to prove other facts, "must also satisfy sec. 904.03, Stats., requiring the trial court to weigh the probative effect of the evidence against its prejudicial effect." *See also, United States v. Abel*, 469 U.S. 45, 54–55, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984).

> Evidence is unfairly prejudicial if it has a 'tendency to influence the outcome by improper means' or it is 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish' or otherwise causes a jury 'to base its decision on something other than the established propositions of the case.' *See Christensen v. Economy Fire & Cas. Co.*, 77 Wis.2d 50, 61, 61 n. 11, 252 N.W.2d 81 (1977).

Lease America Corp. v. Ins. Co. of N. America, 88 Wis.2d 395, 401, 276 N.W.2d 767 (1979).

Other courts have delineated some of the prejudice factors which may warrant the exclusion of bias evidence. One factor is whether the evidence would divert the trial to an extraneous issue. *Hossman v. State*, 467 N.E.2d 416, 418 (Ind.1984). A court can and should exclude bias evidence which has little bearing on the witness's credibility, but which would impugn the witness's character because such evidence "opens the door to improper considerations and lends to the confusion of the jury by placing undue emphasis on collateral matters." *People v. Cole*, 654 P.2d 830, 833 (Colo. 1982). If the bias evidence, taken as a whole, might have directed the jury's attention away from the case under consideration, it may be prejudicial. *Id.* at 834.

The trial court may exclude bias evidence if the very slight probative value of the evidence on the issue of bias fails to overcome its strong likelihood of confusion of the issues and undue delay. *United States v. Jarabek*, 726 F.2d 889, 902 (1st Cir.1984). The appellate court should not find the trial court abused its discretion when the relevance of the proffered bias evidence was unclear and the risk of prejudice was real. *United States v. Sellers*, 658 F.2d 230, 232 (4th Cir.1981). The trial court may prohibit cross-examination in a certain area where to permit it would open up extraneous matters, for the trial court " 'has responsibility for seeing that the sideshow does not take over the circus.' " *United States v. Brown*, 547 F.2d 438, 446 (8th Cir.1977).

In the instant case, the risk of unfair prejudice was great. Allegations of sexual misconduct with patients against a psychiatrist have great potential to unduly prejudice the jury against the witness. Cross-examination on this matter would have distracted the jury from the real issues in the case and would have caused the jury to speculate about unproven charges against the witness. A mini-trial on Dr. Roberts' conduct could have ensued.

trial court does not "set forth its reasoning" for its decision regarding the admission of evidence, we must search the record for a reasonable basis for the decision. *Id.* We will not find an abuse of discretion if any reasonable basis exists for the decision. *Id.* at 342, 340 N.W.2d 498. The fact that a trial court does not expressly balance the probative value of the evidence against the risk of unfair prejudice does not relieve the appellate court of its obligation to do so, if the result would be to sustain the judgment or order.

As for the trial court's actual application of the balancing test in this case, we consider the trial court to have sufficiently set forth its reasoning, *e.g.*, by noting the prejudicial effects that the jury might think "where there is smoke, there's fire."

The trial court clearly did not abuse its discretion in finding that any relevance of the proffered evidence was outweighed by other factors. Pointing out that the allegations against Dr. Roberts were nothing more than allegations and there was a risk that the jury would think that "if there's smoke, there's fire," the trial court accurately focused on what would have amounted to an unfairly prejudicial admission.

Moreover, in reviewing the trial court's ruling, the appellate court should conclude that the trial court relied on the considerations expressed by the prosecutor as grounds for the court's ruling, where the court obviously acquiesced in the prosecutor's explanation, but did not expressly articulate all of its reasoning itself. *See Hagenkord v. State*, 100 Wis.2d 452, 464, 302 N.W.2d 421 (1981). In this regard, although we do not consider the trial court to have "acquiesced" as such, we note that in arguing to prohibit the cross-examination, the prosecutor specifically argued that cross-examination about the pending allegations of sexual misconduct with patients would serve no purpose except to "trash" Dr. Roberts, that it would distract the jury from the real issue, the mental responsibility of Lindh, and that it would cause the jury to specula : about an unrelated issue. These are traditional grounds of prejudice under sec. 904.03, Stats.

We hold that the trial court did not abuse its discretion or otherwise err insofar as it concluded that any relevance of the proffered evidence was outweighed by other considerations, including the risk of unfair prejudice, such that it was not improper to exclude the evidence.

We now turn to the second issue, in which Lindh argues that the trial court erred in refusing to suppress the use of statements taken by Dr. Roberts within hours of Lindh's arrest. Lindh argues that the right against self-incrimination applies to phase II of a trial and that his rights under *Miranda* were not honored.

The Fifth Amendment to the United States Constitution and Article I, sec. 8 of the Wisconsin Constitution guarantee a defendant a right against self-incrimination. Lindh specifically contends that *Miranda* applied in his case insofar as Dr. Roberts conducted his first interview with him at the hospital on the night of the crimes, before the defendant had interposed an insanity defense and before Roberts had officially been appointed as one of the state's experts. Lindh makes this assertion despite the fact that his statements to Dr. Roberts were admitted only at the insanity phase of the trial, only on the issue of Lindh's mental responsibility, only after Lindh interposed an insanity defense and only after he presented expert opinion evidence in support of that defense.

[3] We note as a general matter that the constitution does not apply to prohibit the admission of testimony of a state psychiatric expert in circumstances where the defendant already has interposed an insanity defense and has presented expert testimony in support of that defense. *See Buchanan v. Kentucky*, 483 U.S. 402, 421–22, 107 S.Ct. 2906, 2916–17, 97 L.Ed.2d 336 (1987); *Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989); *United States v. Byers*, 740 F.2d 1104, 1110–11 (D.C.Cir.1984); *Riles v. McCotter*, 799 F.2d 947, 953 (5th Cir.1986); *Schneider v. Lynaugh*, 835 F.2d 570, 575–76 (5th Cir.1988); *Granviel v. Lynaugh*, 881 F.2d 185, 190 (5th Cir.1989); *State v. Hope*, 96 N.C.App. 498, 386 S.E.2d 224 (1989); *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989).

Lindh relies upon *United States v. Hinckley*, 672 F.2d 115 (D.C.Cir.1982) and *Cape v. Francis*, 741 F.2d 1287 (11th Cir. 1984) to support his contention that the right against self-incrimination applies to phase II of a trial. Both cases are clearly distinguishable. In *Hinckley*, F.B.I. agents continued to interrogate the defendant after he requested an attorney and after the defendant said he wanted the interview stopped. The government argued it should at least be allowed to use the defendant's statements and psychiatric opinion evidence based on the police reports of the interview to rebut the defendant's insanity defense. The court held evidence gleaned from the police officer's egregious violation of the defendant's *Miranda* rights could not be used, even for this limited insanity rebuttal purpose, because exclusion was necessary to curtail such misconduct. *Hinckley*, 672 F.2d at 133–34. In *Cape v. Francis*, the court held an expert's opinion that the defendant was sane and criminally responsible could not be admitted at phase I of the case. Moreover, the expert's opinion was based upon the defendant's unwarned statements made during a court-ordered psychiatric exam, and the defendant never raised the insanity defense.

Lindh also relies, unpersuasively, upon *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987), which involved a police interview and not a psychiatric interview. The question of whether the fifth amendment applied to the insanity issue was not considered. Finally, Lindh relies on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In *Estelle*, the trial court had *sua sponte* appointed a psychiatrist to examine the defendant and determine his competency. After the defendant was found guilty, the state used the psychiatrist's opinion as evidence of the defendant's future dangerousness at the penalty phase of the trial, where the state had the burden of proving future dangerousness in order to secure the death penalty. At the competency hearing, the psychiatrist had not informed the defendant that he had the right to remain silent and he had given the defendant no indication that the court-ordered examination would be used to gather information necessary to decide whether he would receive the death penalty. The court held that under "these distinct circumstances," the defendant's fifth amendment privilege against self-incrimination was violated. *Id.* at 466, 101 S.Ct. at 1875.

By its own terms, *Estelle* is limited to its facts. In fact, the Supreme Court in *Estelle* clearly appears to have exempted from its holding a situation such as in the instant case, indicating that a defendant who asserts the insanity defense and introduces supporting psychiatric evidence cannot also preclude the state from conducting an examination and introducing the product of that examination. *Estelle*, 451 U.S. at 465, 101 S.Ct. at 1875.

In *Estelle*, the defendant made his statements unwittingly, unknowing that the state would use them to secure the death penalty, on which issue it had the burden of proof beyond a reasonable doubt. In contrast, in the instant case, the defendant made his statements knowingly. More important, he had the burden of proof, and the evidence from the interview was only used for the purpose of rebutting the defendant's insanity argument. The state was not using the "simple, cruel expedient" of forcing evidence from the defendant's own lips to meet its burden of proof. *Id.* at 462, 101 S.Ct. at 1872, *quoting Culombe v. Connecticut*, 367 U.S. 568, 581–82, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961).

We focus on the nature and purpose of the examination and not on its timing. The fact that Dr. Roberts conducted his interview before and not after Lindh interposed his insanity defense would not appear relevant in this regard. There are valid legal and policy reasons for this focus.

[4] A psychiatric interview designed to ascertain a defendant's mental responsibility, evidence of which is not admitted until phase II of trial, is not accusatory in nature. It looks at the past conduct of which the interviewer was already aware. We consider that *Miranda* warnings, which are aimed against involuntary self-incrimination, are a prerequisite neither to such an interview nor to admission of the results of the interview at phase II. *Cf. State v. Knapp*, 111 Wis.2d 380, 388, 330 N.W.2d 242 (Ct.App.1983); *State v. Heffran*, 129 Wis.2d 156, 165–66, 384 N.W.2d 351 (1986).

Complete information is essential on the insanity defense, and the best information comes from an expert examination of the defendant himself. To the extent official misconduct needs to be deterred, sufficient deterrence is adequately provided by excluding the evidence from the guilt phase. The great importance and reliability of the defendant's own statements on this issue should not be undercut by any incremental benefits to be gained by suppression. Reliability of the fact-finding process would be decreased by application of the constitu-

tional privilege. *Cf. Allen v. Illinois*, 478 U.S. 364, 374–75, 106 S.Ct. 2988, 2994–95, 92 L.Ed.2d 296 (1986). Admission of the results of a state psychiatric examination of a defendant who raises the insanity defense does not tarnish or diminish the "noble aspirations" and "fundamental values" underlying the privilege against self-incrimination. *See generally Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964).

We thus hold that the constitutional privilege against self-incrimination does not require the exclusion of results of a psychiatric interview with the defendant from phase II of a trial on the grounds that the psychiatrist did not comply with the dictates of *Miranda*.

[5] Assuming, *arguendo*, that *Miranda* is applicable in the case at bar, we will consider Lindh's argument that Dr. Roberts failed to scrupulously honor his purported assertion of his right to remain silent when he indicated he did not want to discuss the details of the shootings.

A defendant's exercise of his right to silence must be "scrupulously honored," *State v. Hartwig*, 123 Wis.2d 278, 284, 366 N.W.2d 866 (1985), citing *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence. *Id.*

These principles notwithstanding, it is clear that Lindh never exercised or invoked his right to silence during his interview with Dr. Roberts on the day of the shooting. Lindh did not assert that he did not want to talk with Dr. Roberts. Never did he say that he did not want to answer additional questions. He did not ask Dr. Roberts to end the interview or to go away. He said only that he did not want to discuss the details of the shootings. That, standing alone, is not an invocation of the right to silence. *See e.g., State v. Koput*, 134 Wis.2d 195, 202, 396 N.W.2d 773 (Ct. App.1986), *rev'd on other grounds*, 142 Wis.2d 370, 418 N.W.2d 804 (1988); *People v. Galimanis*, 765 P.2d 644 (Colo.Ct.App. 1988), *cert. granted*, 783 P.2d 838 (Colo. 1989); *People v. Brockington*, 126 A.D.2d 655, 511 N.Y.S.2d 84, 86 (1987).

We conclude that, even if Lindh arguably did invoke his right to remain silent, Dr. Roberts scrupulously honored that right. Whether the questioner used "improper persuasive tactics" or "overbearing or coercive tactics" is determinative. *State v. Turner*, 136 Wis.2d 333, 357–60, 401 N.W.2d 827 (1987). Here, such tactics were not used.

Thus, we hold that the trial court did not abuse its discretion or otherwise err either in excluding the evidence proffered by Lindh on cross-examination or in admitting the testimony of Dr. Roberts pertaining to his interview of Lindh on the evening of the shootings. Because of our holdings in this case, we need not consider the question of harmless error with respect to either issue.

The decision of the court of appeals is reversed.

BABLITCH, J., withdrew from participation.

SHIRLEY S. ABRAHAMSON, Justice (dissenting).

I agree with the unanimous decision of the court of appeals that the circuit court committed prejudicial error in completely barring the defendant from cross-examining the psychiatrist-witness about a pending investigation into the witness's alleged criminal misconduct to show bias.[1]

The majority opinion holds that the test to determine whether defense counsel may cross-examine a state's witness about alleged criminal misconduct to show the witness's bias is whether a jury could find a

1. Cross-examination directed toward revealing biases, prejudices, or ulterior motives of a witness—that is, an interest of the witness that may relate directly to issues or personalities in the case at hand—is a particular attack on the credibility of the witness. The proper standard for the test of relevancy in cross-examination is whether the evidence will be useful to the jury in appraising the credibility of the witness. *Rogers v. State*, 93 Wis.2d 682, 689, 287 N.W.2d 774 (1980).

"logical connection" between the criminal investigation of the witness and the district attorney's office on whose behalf the witness was testifying. The majority then concludes that the circuit court did not err in excluding the evidence, because "the relationship between the Dane county district attorney's office and [the witness] which would be necessary to suggest bias, interest or motive simply did not exist." Majority op. at 177.[2]

This test does not conform to the test set forth in earlier cases. This court and the United States Supreme Court have concluded that "a defendant, as an ingredient of meaningful cross-examination, must have the right to explore the *subjective* motives for the witness' testimony."[3] Evidence is relevant to the issue of bias in this case if it tends to prove that the witness believed that he might be aided or harmed by testifying in a particular way. The focus of the circuit court's inquiry should be on the witness's state of mind.

Because I believe the majority opinion uses an incorrect standard and reaches an incorrect decision, I dissent.

I.

I believe that the circuit court in this case had to apply the following analysis to determine the relevance of evidence proffered on cross-examination to show a witness's bias: Does the proposed cross-examination support a reasonable inference that the witness believed he might benefit if he testified in favor of the state's position, or he might be disadvantaged if he testified against the state's position?

The party asserting bias need not prove that the witness received promises from the state or would in fact benefit from or be harmed by giving certain testimony. It is enough if the witness believes he or she has a self-interest in the testimony.[4]

Even if the witness's beliefs were "absurd," the adverse party has a right and a duty to explore the witness's motives. We explained this obligation in *State v. Lenarchick*, 74 Wis.2d 425, 447, 247 N.W.2d 80 (1976), as follows:

> Although no promises had been made to [the witness], he may well have been testifying favorably to the state in the hope and expectation that the state would reward him by dropping or reducing pending charges. Even though that expectation were absurd, defense counsel had the right and duty to explore the witness' motives.

I conclude that the majority opinion mistakenly adopts a new test to determine the relevance of evidence to show a witness's bias that deviates from the test this court and the United States Supreme Court have established.

2. The majority asserts that there was no evidence of any investigation of Dr. Roberts during the pendency of the defendant's case. Majority op. at 178. I believe that for the purposes of this appeal, the fact that allegations of professional misconduct by Dr. Roberts had been referred to a special prosecutor is sufficient evidence that some kind of investigation would follow.

3. *State v. Lenarchick*, 74 Wis.2d 425, 448, 247 N.W.2d 80 (1976) (Emphasis added).

According to the United States Supreme Court, evidence relating to bias on cross-examination is relevant if a jury might reasonably find that the evidence "furnished the [state's] witness a motive for favoring the prosecution in his testimony." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).

The circuit court must recognize that a jury need not accept the witness's denial about bias. Cross-examination should be permitted "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974).

4. In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), for example, the Supreme Court held that it was error to bar evidence on cross-examination that a state witness was on juvenile probation. The adverse party asserting bias in that case wished to show that the witness may have feared that his probation would be revoked and feared that he might be a suspect in the investigation. There was no suggestion that actual threats of revocation of probation had been made to the witness or that the witness was a suspect.

See also *State v. Balistreri*, 106 Wis.2d 741, 753, 317 N.W.2d 493 (1982).

II.

Applying the test this court and the United States Supreme Court have used to determine the relevance of evidence proffered to show bias, I conclude that the circuit court erred in barring cross-examination on the issue of bias in this case.

In reviewing the circuit court's decision about the scope of cross-examination to show bias, an appellate court must consider (1) that an adverse party is allowed great latitude regarding the subject and scope of the inquiry to show bias; (2) that the determination of the relevancy of the line of questioning proffered to establish bias is within the discretion of the circuit court;[5] and (3) that it is error for a circuit court to bar an accused from presenting all facts from which a jury might reasonably infer bias of a prosecution witness.[6]

The circuit court in this case determined that the evidence proffered was "totally irrelevant and immaterial" to the issues of motive, interest or bias.[7] The state argues that on a sliding scale of possible bias, the defendant's theory of bias in this case is too weak to allow the defendant to cross-examine on this subject.

Both the majority opinion and the circuit court apparently base their determination of lack of relevance on two factors and reason as follows:

1. Dr. Roberts learned two facts simultaneously. He learned that the state might investigate allegations of criminal conduct his patients made against him. He also learned that a special prosecutor unconnected with the Dane County district attorney's office would be in charge of the matter. Knowing that the Dane County district attorney was prosecuting the defendant in this case and another district attorney's office was in charge of a possible investigation of him for criminal charges, Dr. Roberts could not possibly think that his testimony benefitting the Dane County district attorney's case against the defendant could influence the outcome of his own potential criminal case.

2. Criminal charges were not filed against Dr. Roberts during the pendency of the defendant's case. Thus during the pendency of the defendant's case, because any prosecution of Dr. Roberts was "merely a possibility, there was no reasonable basis to believe that Dr. Roberts would color his report...." or testimony. Majority op. at 178. The majority intimates that no bias can be shown unless criminal charges are filed or there is proof of actual negotiation between the witness and the state regarding specific pending charges.

This reasoning is, I believe, flawed. The majority's reliance upon the special prosecutor's being in the Milwaukee County district attorney's office and not in the Dane County district attorney's office lends little support for the majority's conclusion. Even though the circuit court or the majority believes that the presence of two autonomous district attorney offices guarantees that the one would not influence the other,

5. In *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981), the court stated the method for reviewing a circuit court's discretionary determination:

> A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning. The record here demonstrates beyond doubt that the trial court in this case failed to articulate and use the discretionary standards which the legislature has set as guidelines for determining an award of maintenance and failed to set forth the facts upon which it relied.

6. *State v. Lenarchick*, 74 Wis.2d 425, 446–448, 247 N.W.2d 80 (1976).

7. The circuit court stated: "And I think it's fair to say that, no matter what [Dr. Roberts does] for the Dane County district attorney's office, [Dr. Roberts] would not be able to influence any result, as a result of [the special prosecutor's] investigation or any judge that might ultimately hear it, should there be any charges filed."

Dr. Roberts might have believed otherwise. Dr. Roberts would know that his testimony in this high profile case would be an open, public record that the special prosecutor might very well hear or read about.

The record shows that Dr. Roberts learned of his expanding difficulties with various authorities after his January interview with the defendant and before he filed his report in August. He learned about investigations by the University Hospital and the State Medical Examining Board and that allegations against him had been referred to the State Justice Department and the district attorney's office. Nothing in the record indicates that Dr. Roberts had formed an opinion regarding the defendant's mental state after the first interview. Indeed, Dr. Roberts interviewed the defendant in June and again in August shortly before trial in September, 1988.

A jury could infer that Dr. Roberts may have felt intensified internal pressure over the entire period to shade his testimony in favor of the state. A jury could infer that Dr. Roberts believed, however unwarranted the belief, that if he testified favorably for the state in the defendant's case, the special prosecutor might be more favorably disposed to drop the investigation; or to investigate the allegations less vigorously; or to show leniency in any charges filed or in a plea agreement or in a recommendation on sentencing.

Neither case law nor logic supports the majority's view that formal charges must be filed before an investigation into criminal behavior is relevant to the issue of bias. The cases stand for the proposition that "when a witness is subject to the coercive power of the state and can also be the object of its leniency" an adverse party must have the opportunity to explore the subjective motives for the witness's testimony. *State v. Lenarchick*, 74 Wis.2d 425, 447–448, 247 N.W.2d 80 (1976).[8]

That charges had not been filed against Dr. Roberts strengthens rather than weakens the defendant's theory of bias.[9] Dr. Roberts rendered his opinion on the defendant's mental capacity when he did not know what the state would do to him. The jury could reasonably infer that as long as the special prosecutor deferred action on Dr. Roberts's case, Dr. Roberts could hope—even though that hope may have been unrealistic—that he might help his own cause by testifying favorably for the state's position in the defendant's case.

In this case the range of cross-examination to show bias should be even broader than in other cases. In many areas, such as fingerprints, ballistics, and forensic chemistry, expert testimony opinions are formed from "hard" data, knowledge or principles. The opportunity for the expert opinion to be influenced by bias is limited. Psychiatry, in contrast, is a field based largely on "soft" data or knowledge. Under these circumstances the possibility increases that the psychiatrist's findings, opinions, and presentations may be slanted, consciously or unconsciously, by any biases. J. Ziskin and D. Faust, *Coping with Psychiatric and Psychological Testimony* 45 (4th ed. 1988).

I conclude that under the circumstances of this case the circuit court abused its discretion in ruling that the evidence of the criminal investigation involving Dr. Rob-

8. *See United States v. Garrett*, 542 F.2d 23 (6th Cir.1976), holding it was abuse of discretion for the trial court to exclude evidence that the government's witness in a drug case had been suspended from the police force because he was suspected for using hard drugs himself and had refused to submit to a urine test. The court of appeals concluded that a jury may have inferred that the witness looked upon a successful prosecution as a means of having his suspension lifted.

See also *State v. Chesnut*, 621 P.2d 1228, 1233 (Utah 1980), *disapproved on other grounds, State v. Crick*, 675 P.2d 527, 531 (Utah 1983) ("the mere possibility of future criminal charges is a sufficient basis to explore the motives of the witness on cross-examination [and to] place his apprehensions thereof before the jury").

9. The fact that the charges against Dr. Roberts were unproven might be important to the defendants' theory of admissibility based on challenging Dr. Roberts's credibility. Since I conclude that the evidence was admissible to show bias, I do not reach that issue.

erts was irrelevant to the defendant's theory of bias.[10]

III.

Relevant evidence, of course, may be barred if its probative value is outweighed by unfair prejudice. The circuit court may exclude relevant evidence if it has "a tendency to influence the outcome by improper means." *State v. Baldwin*, 101 Wis.2d 441, 455, 304 N.W.2d 742 (1981). The state argues that unproved allegations of Dr. Roberts's sexual misconduct with patients is a "highly emotionally charged" issue that would distract the jury.

Dr. Roberts's testimony was of great importance to the state. The sole issue in the second phase of the trial was the defendant's mental state. Both the state and the defendant relied on expert witnesses to prove the defendant's mental state. Dr. Roberts was the only expert witness who saw the defendant at the critical time, the day of the offense. The jury's responsibility was to "weigh the opinion of one expert against that of another ... consider[ing] the relative qualifications and credibility of the expert witnesses." Wis JI–Criminal 200A (Rel. No. 10—11/83).[11]

The evidence of Dr. Roberts's being an object of an investigation for criminal wrongdoing was probative of bias. Any prejudice or distraction caused by giving this information to the jury could have been circumscribed by restricting the scope of the defendant's cross-examination.[12] The nature of the allegations made by Dr. Roberts's patients was irrelevant to the defendant's theory of bias. The relevant information for the jury was the seriousness of the allegations, the referral of the allegations by the hospital to the state for possible criminal prosecution, and the effect on Dr. Roberts's professional career, livelihood, reputation and personal life should he be charged with or convicted of these charges.

Given an adverse party's great latitude regarding the subject and scope of an inquiry to show the witness's bias, the importance of Dr. Roberts's testimony, and the circuit court's power to curtail any undue prejudice to the state by limiting the cross-examination, the circuit court abused its discretion in barring all the proffered evidence, concluding that prejudice to the state outweighed the probative value of the evidence in this case.

IV.

I further conclude that the error barring the evidence was not harmless. Dr. Roberts was the state's primary psychiatric witness. He emphasized in his testimony the value of having interviewed the defendant on the day of the shooting—an advantage the other psychiatric witnesses could not claim. Despite the defendant's having the burden of proof on the mental disease or defect issue in the second half of the bifurcated trial, I conclude that prohibition of the bias evidence on cross-examination of Dr. Roberts undermines confidence in the outcome of this case. *State v. Dyess*, 124 Wis.2d 525, 544–45, 370 N.W.2d 222 (1985).

V.

Finally, I register my disagreement with the majority's conclusion that the *Miranda* rule does not apply to Dr. Roberts's initial interview of the defendant. The United States Supreme Court has not yet decided a case which discusses the application of *Miranda* in situations such as the one presented in this case, namely, where the interview takes place before the accused

10. Because I believe the circuit court abused its discretion in refusing to admit the evidence of bias on cross-examination, I do not reach the defendant's constitutional claim based on the confrontation clause. I note, however, that conforming to the Wisconsin Rules of Evidence may not satisfy constitutional requirements.

11. The members of the jury are always the "sole judges of the credibility of the witnesses and the weight and credit to be given to their testimony." Wis JI–Criminal 300 (Rel. No. 25—6/90)

12. The circuit court never considered limiting instructions, because the court ruled the evidence was not relevant.

has been charged or has raised a defense of insanity.[13]

The court should not reach out and decide this issue which is not presented by the facts of the case. The court of appeals correctly determined, I believe, that Dr. Roberts's *Miranda* warnings to the defendant were adequate and that the defendant's rights were honored. Although Dr. Roberts failed to inform the defendant that a lawyer would be provided to him at state expense, if necessary, a Dane County detective gave the defendant his full *Miranda* rights less than an hour before the interview with Dr. Roberts.

For the reasons set forth, I would affirm the decision of the court of appeals. Like the court of appeals, I would remand for a new trial on the defendant's plea of not guilty by reason of mental disease or defect.

APPENDIX D

156 Wis.2d 768

STATE of Wisconsin,
Plaintiff-Respondent,

v.

Aaron LINDH, Defendant-Appellant.

No. 89-0896-CR.

Court of Appeals of Wisconsin.

Submitted on Briefs Dec. 8, 1989.

Opinion Released May 24, 1990.

Opinion Filed May 24, 1990.

Defendant was convicted of murder. Judgment was entered in the Circuit Court, Dane County, Robert R. Pekowsky, J. De-

fendant appealed. The Court of Appeals, Gartzke, P.J., held that: (1) psychiatrist interviewing suspect shortly after incident did not improperly advise him of his rights to remain silent, and (2) trial court committed prejudicial error by refusing to permit defendant to cross-examine psychiatrist as to charges that ne had sexually abused his patients.

Reversed and remanded.

1. Criminal Law ⇐412.2(3)

Warnings given by psychiatrist acting as agent of state in questioning suspect in murder case, as to his right to remain silent, were satisfactory even though no mention was made of right to free legal counsel and to suspect's right to stop answering questions at any time; full and correct *Miranda* warnings had been given by police detective less than one hour previously. U.S.C.A. Const.Amend. 14.

2. Criminal Law ⇐412.1(4), 412.2(5)

Murder suspect's closing of his eyes, following comment by psychiatrist acting as agent of police that he would give suspect a few minutes to consider whether he wished to continue answering questions, did not constitute assertion of right to remain silent but was rather an expressed initial reluctance to discuss a topic which suspect waived by continuing to answer questions after psychiatrist returned. U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐489

Trial court erred in prohibiting defendant in murder case from cross-examining State's psychiatric witness as to psychiatrist's alleged sexual activities with his patients, even though issue was unrelated to the murder; defendant should have been allowed to develop argument that psychiatrist, who was facing possible criminal charges, would be apt to tailor his testimony regarding defendant's competency in order to gain favor with prosecutor.

1. Section 971.15, Stats., provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

(2) As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

4. Criminal Law ⇐1169.9

Trial court committed prejudicial error by prohibiting defendant in murder case from cross-examining psychiatrist, who was State's principal witness as to defendant's competency, as to charges that psychiatrist had engaged in improper sexual activity with patients; psychiatrist had emphasized that his findings were superior to contrary findings of defendant's psychiatrist because they were made shortly after incident occurred, and if jury had discounted testimony due to revelations of state psychiatrist's sexual activities, State's only other psychiatrist witness had given much more "guarded" statement that defendant was competent.

Kenneth P. Casey, Asst. State Public Defender, on the brief, for defendant-appellant.

Donald J. Hanaway, Atty. Gen., by Sally L. Wellman, Asst. Atty. Gen., on the brief, for plaintiff-respondent.

Before GARTZKE, P.J., and SUNDBY and DYKMAN, JJ.

GARTZKE, Presiding Judge.

Aaron Lindh appeals from a judgment of conviction of two counts of first-degree murder, sec. 940.01(1), Stats. 1985, while using a dangerous weapon, sec. 939.63(1)(a)2, Stats., of attempted first-degree murder while using a dangerous weapon, sec. 939.32(1)(a), and of carrying a firearm in a public building, sec. 941.235(1), Stats.

On January 15, 1988, Lindh carried a shotgun into the City-County Building in Madison, Wisconsin, and shot three people he did not know. When deputy sheriff Louis Molnar ordered Lindh to stop and put down his weapon, Lindh advanced on him while shouting "Shoot me! Kill me!" Lindh and Molnar simultaneously fired at each other. Lindh was hit and disabled. Molnar was not hit. Two of Lindh's three victims died.

Lindh pled not guilty by reason of mental disease [1] to all charges. A bifurcated trial

was held pursuant to sec. 971.165, Stats. He pled guilty to the firearm charge and the dangerous weapon penalty enhancer and was found guilty of the other charges by a jury. The jury then found Lindh did not have a mental disease at the time of the shootings. Lindh challenges only that finding.

Lindh contends that the trial court erred by refusing to suppress statements he made to a psychiatrist. We conclude that the court did not err in that regard. Lindh also contends that he should have been allowed to cross-examine the psychiatrist about pending investigations into his sexual misconduct with patients. We agree, and because the error was prejudicial, we reverse the judgment and remand for a new trial as to Lindh's mental state.

1. FACTS

Lindh was taken to the hospital after deputy Molnar shot him, was placed under general anesthesia, and underwent surgery which ended at 3:30 p.m. Lindh was then sedated, placed in intensive care, and given pain medication.

During the afternoon, the prosecutor assigned to the case retained Dr. Leigh Roberts, a psychiatrist with a specialty in forensic psychiatry. The prosecutor told Dr. Roberts that a shooting had occurred, that Lindh was in custody, and that questions might be raised regarding his mental state during the shooting. The prosecutor asked Dr. Roberts to interview Lindh.

At 8:34 p.m., two Madison detectives questioned Lindh in intensive care. They questioned him for thirty minutes after first identifying themselves and warning him in accordance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[2] They concluded the interview when Lindh said he was thirsty and was starting to feel some pain.

At 9:33 p.m., Dr. Roberts came to Lindh's hospital room. At the suppression hearing, Dr. Roberts testified as follows:

Q: When you first contacted [Lindh], what did you tell him, if anything?

A: When I first contacted him, I introduced myself. I explained that you [the prosecutor] had sent me. I explained the purpose of the examination, related to my determining his mental state as of that time and as of earlier that day. As I went through each of the items with him, I asked him if he understood and got a verbal affirmative response from him. I explained to him that our discussion was not of a confidential nature, that anything that was reported could subsequently be reported to other persons, since it was done at the request of the District Attorney's office and it related to legal matters. I explained to him that he did not have to speak with me. I asked him if he had an attorney. He indicated, "No." I asked him if he wanted an attorney before he spoke with me. And, again, he indicated, "No." I asked him if he understood that he was giving up his right to have an attorney before talking with me, if he did talk with me. And he indicated he did. I explained to him that the

2. One of the detectives read Lindh his rights from a card which said: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have a lawyer present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed at county expense to represent you before any questioning, if you so wish. You can decide at any time to exercise these rights and not answer any questions or make any statements." The detective asked Lindh after each sentence whether he understood it. Lindh each time stated that he did. When asked whether he was willing to talk with those rights in mind, Lindh responded, "Sure."

concerns about his mental state had to do with was he at risk to harm himself.

....

I explained to him, also, that the purpose of the examination had to do with his mental abilities now, in terms of talking with people, and my assessment of his mental abilities that afternnoon, and that that might be used later in a court process, concerning was he mentally responsible.

....

Q: Did you indicate to him, sir, that if he couldn't afford to hire an attorney, one would be provided for him, before you talked to him?

A: No. I did not.

Dr. Roberts did not tell Lindh that he could stop the questioning at any time.

Dr. Roberts asked Lindh if he could recall what had happened earlier that day in the City–County Building. Lindh said he had a limited amount of recall but remembered shooting three people. When asked why, Lindh responded that he did not know and that he did not want to discuss the details at that time. Dr. Roberts then suggested that Lindh might want to reconsider whether to talk at all because he did not have a lawyer. Lindh responded by closing his eyes. Dr. Roberts stated that he would leave, wait a few minutes, and then return.

Dr. Roberts left Lindh and returned twelve minutes later. Lindh said he understood that he did not have to talk with Dr. Roberts and understood why Dr. Roberts was there. Dr. Roberts then mentioned the absence of a lawyer but Lindh said he would talk. Dr. Roberts asked Lindh about his background, what had led to the shooting incident, and his past and present mental state. This second meeting lasted for about thirty minutes.

On March 8, 1988, Dr. Roberts learned that the University of Wisconsin hospital was investigating a claim that he had engaged in sexual misconduct with a female patient. He knew of sec. 940.22, Stats., which provides criminal penalties for the sexual exploitation of a patient by a therapist. In May 1988, he learned that the Medical Examining Board was investigating charges against him. The complaint before the board alleged several incidents of sexual misconduct by Dr. Roberts with three female patients.

On April 8, 1988, Lindh moved to suppress his statements to the police and Dr. Roberts because they were obtained in violation of *Miranda*. The trial court denied the motion by decision and order filed September 15, 1988.

Meanwhile, on June 22, 1988, Dr. Roberts again interviewed Lindh in the Dane county jail. The next day, the hospital referred the investigation of Dr. Roberts' sexual misconduct to the Dane county district attorney. The district attorney immediately sought to have a special prosecutor appointed. The circuit court made the appointment on June 28, 1988. Dr. Roberts learned of the appointment on July 8, 1988. On August 17, 1988, he issued a report concluding that Lindh did not suffer from a mental disease on the day of the shooting. On August 22, 1988, he again interviewed Lindh.

The state moved the trial court *in limine* to prohibit any inquiry at trial about the allegations of sexual misconduct against Dr. Roberts or any possible ramifications of the allegations. The court granted the motion.

At the mental disease stage of the trial, Dr. Ezra Griffith testified on behalf of Lindh. Dr. Griffith is a specialist in forensic psychiatry and an associate professor of psychiatry at Yale University. He opined that at the time of the shooting Lindh suffered from a mental disease. He was in the throes of a psychotic state diagnosed as a brief reactive psychosis. As a result of that state, Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

Dr. Griffith also testified that long before the shooting Lindh had suffered from mental disorders. Dr. Griffith characterized Lindh's long-term disorder as a mixed personality disorder which fit into two diagnostic categories: borderline personality disorder and narcissistic personality disorder. He then described the relationship between the long-term disorders and Lindh's psychotic state at the time of the shooting. He testified that brief reactive psychoses are known complications of each personality disorder.

Dr. Roberts was the state's principal witness. While being qualified in the presence of the jury as an expert witness, Dr. Roberts noted that he had "eight grandchildren up to nearly the age of Mr. Lindh," that he was a faculty member of the University of Wisconsin Medical School, an adjunct faculty member of the San Francisco Theological Seminary, and on the board of trustees of North Central College, that he had served on various committees dealing with mental retardation, rehabilitation, and the sex crimes law, that he had chaired conferences on mental health in relation to religion, rehabilitation, and law, and that he had recently been honored "as essentially the mid-west psychiatrist of the year." He had testified "several hundred times" on the mental condition of persons who have committed crimes.

Dr. Roberts opined that Lindh was not suffering from a mental disease at the time of the shooting. He had an antisocial personality disorder but that is not a mental disease. He had neither a borderline nor a narcissistic personality disorder. He did not suffer a brief reactive psychosis.

Dr. Roberts implied he had an advantage in diagnosing Lindh's mental state because he had interviewed Lindh within hours of the crime. When asked how important it was to see Lindh on the day of the shooting, Dr. Roberts testified:

> It's very important. It's not always essential.... However, it is very helpful to have had the first hand experience and to be able to do a professional evaluation that close in time to the actual event and to see what he looked like in that immediate period, that particular day within just a few hours of the time that [the] behavior occurred....

The state also called Dr. Frederick Fosdal, a psychiatrist, as an expert witness. Dr. Fosdal was present during the testimony of the other two doctors and had available to him most of the same materials they relied upon. He testified that he had twice talked with Lindh for three hours and the information he obtained during those interviews was identical to that the other doctors obtained.

Dr. Fosdal opined that Lindh was not suffering a brief reactive psychosis on the day of the shootings. Lindh had no mental disease on that day. He agreed with Dr. Griffith that Lindh fit the category of mixed personality disorder. He conceded that Lindh might have the traits of both a narcissistic personality disorder and a borderline personality disorder. He agreed that brief reactive psychoses are possible complications of each disorder and that a brief reactive psychosis is a mental disease.

The jury found that Lindh was not suffering from a mental disease at the time of the shootings in the City–County Building on January 15, 1988. The trial court entered the judgment of conviction from which Lindh appeals.

2. VIOLATION OF MIRANDA RIGHTS

[1] The prosecution stipulated that Dr. Roberts acted as an agent of the police when he initially questioned Lindh after his surgery. As a police agent, Dr. Roberts was required to give *Miranda* warnings.

Lindh argues that Dr. Roberts gave him insufficient *Miranda* warnings when interviewing him on the day of the shooting. Lindh notes that Dr. Roberts failed to advise him that he had the rights to have counsel appointed for him if he could not afford counsel and to cut off questioning at any time. He also argues that Dr. Roberts failed to scrupulously honor Lindh's invocation of his right to remain silent.

The state denies that Lindh's *Miranda* rights were violated. It argues in the alternative that the privilege against self-incrimination does not apply to the mental disease phase of a bifurcated trial. We conclude that Lindh's *Miranda* rights were not violated. We therefore do not reach the state's alternative argument.

That Dr. Roberts gave Lindh incomplete *Miranda* warnings is undisputed. However, Lindh admits that a detective had given him a complete set of warnings an hour before Dr. Roberts arrived. Lindh ended his conversation with the detectives by stating that he was thirsty and feeling some pain, not by invoking his right to remain silent or his right to an attorney. When Dr. Roberts arrived, he explained to Lindh that he had the right not to talk and asked Lindh if he wanted counsel before questioning.

Given the complete *Miranda* warnings to Lindh an hour earlier, we conclude that Dr. Roberts gave him "the now familiar *Miranda* warnings ... *or their equivalent.*" *California v. Prysock*, 453 U.S. 355, 360, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981) (emphasis in original) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 297, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 [1980]). "It would be strange indeed for [a] court to hold that, where within the space of a few hours a defendant has been properly advised of his rights, a subsequent confession would be vitiated by an admonition that was somewhat less than technically perfect." *Grennier v. State*, 70 Wis.2d 204, 213, 234 N.W.2d 316, 321 (1975). Here only an hour intervened between Lindh's being properly advised and the less than complete admonitions.

[2] Lindh argues that he invoked his right to remain silent by telling Dr. Roberts that he did not want to discuss the details of the shootings and by closing his eyes when Dr. Roberts said he might want to reconsider whether to have an attorney present. We disagree.

Lindh did not invoke his right to remain silent but rather expressed initial reluctance to discuss a topic. *People v. Galimanis*, 765 P.2d 644, 647 (Colo.Ct.App. 1988), *cert. granted*, 783 P.2d 838 (Colo. 1989). Dr. Roberts gave Lindh a few minutes to reconsider whether he wanted to talk at all and whether he wanted an attorney. Lindh acquiesced by closing his eyes. He at no time stated he did not wish to talk or that he wanted an attorney. When Dr. Roberts returned, Lindh agreed to talk, answered background questions, and then freely discussed details of the shootings. As in *Galimanis*, "[t]here is nothing in the record to show that his comments were coerced or involuntary in any way, or that his responses were the result of surreptitious mental invasion." *Id.* (citing *Early v. Tinsley*, 286 F.2d 1 [10th Cir.1960], *cert. denied*, 365 U.S. 830, 81 S.Ct. 717, 5 L.Ed.2d 708 [1961]).

Having concluded that Lindh's *Miranda* rights were not violated, we need not and do not decide whether statements taken in violation of *Miranda* must be suppressed in the mental disease phase of a bifurcated trial.

3. IMPEACHMENT OF PSYCHIATRIST

Lindh argues here, as he forcefully argued to the trial court, that he should have been allowed to cross-examine Dr. Roberts about the pending investigations concerning his alleged sexual misconduct with patients. Lindh avers that the error prejudiced him and violated the confrontation clause of the sixth amendment to the United States Constitution. We conclude prejudicial error occurred and do not reach the constitutional question.

[3] The trial court precluded Lindh's cross-examining Dr. Roberts regarding the investigations on grounds that the matter was irrelevant to the sanity issues and did not support Lindh's theory that Dr. Roberts was biased. We will sustain the exclusion of evidence on relevancy grounds unless the trial court abused its discretion. *Rogers v. State*, 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980). "The proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." *Id.* In Wisconsin, any relevant matter may be inquired into on cross-examination without regard to the scope of direct examination. *Id.*

Lindh contends that the evidence of the pending investigation was relevant to Dr. Roberts' truthfulness. He asserts that the evidence tended to show bias because Dr. Roberts faced possible criminal charges and might want to curry favor with the prosecutor and affected his credibility as a supposedly "impartial professional who is just rendering an objective opinion." The state responds that any connection between the pending investigations and Dr. Roberts' professional opinion on Lindh's mental state is far-fetched. The criminal investigation had been referred by the Dane county district attorney to a special prosecutor. No criminal charges had been brought against Dr. Roberts. No deal had been struck.

However, in this case, as in *Rogers*, the credibility of the witness whose impeachment was disallowed was an unusually important factor. *Rogers*, 93 Wis.2d at 691, 287 N.W.2d at 778. Although Dr. Roberts was not the state's only expert witness, he implied that he was situated advantageously because he was the only psychiatrist who saw Lindh on the day of the shootings. He disputed each contention of Lindh's expert. And his profession and livelihood could be jeopardized if he were convicted of sexual misconduct with a patient.[3]

> A trial court should be particularly solicitous of cross-examination intended to disclose bias or prejudice; e.g., a broad opportunity for examination should be allowed if its objective is to establish that an adverse witness in a criminal matter is giving his testimony in anticipation of favorable personal treatment, such as, police leniency by the state....
>
> ... The mere possibility of future criminal charges is a sufficient basis to explore the motives of the witness on cross-examination [and to] place his apprehensions thereof before the jury.

State v. Chesnut, 621 P.2d 1226, 1233 (Utah 1980), *disapproved on other grounds, State v. Crick*, 675 P.2d 527, 531 (Utah 1983).

While the record discloses no direct evidence that any state authority threatened or promised anything to Dr. Roberts, the jury could have reasonably inferred that a witness in the position of Dr. Roberts would perceive that he would benefit if he testified against Lindh or that he would suffer retaliation if he testified in favor of Lindh. The jury could consider those inferences strengthened by the circumstances of Lindh's crime.[4] Whether or not the trial judge or the judges of the court of appeals would draw those same inferences is not the question. We leave such matters to juries if the inferences are reasonable.

We conclude the trial court abused its discretion by not permitting cross-examination of Dr. Roberts regarding the pending investigations of sexual misconduct. The jurors were entitled to know the facts from which they could reasonably infer possible bias on the part of the state's most important witness in the mental disease phase of Lindh's trial. They should have heard evidence useful to them "in appraising the credibility of the witness and evaluating the probative value of the direct testimony." *Rogers*, 93 Wis.2d at 689, 287 N.W.2d at 777.

[4] The error prejudiced Lindh. If the jury had disbelieved Dr. Roberts, they could have relied upon the other expert for the state, Dr. Fosdal. His testimony was significantly more guarded than Dr. Roberts'. Dr. Fosdal agreed with Dr. Griffith that Lindh fit the category of mixed personality disorder and conceded Lindh might have the traits of narcissistic and borderline personality disorders. Dr. Fosdal conceded that brief reactive psychoses are known complications of the latter two disorders. If the jury had been given reason to doubt Dr. Roberts' diagnoses, it could have concluded Lindh had suffered a brief reactive psychosis and therefore a mental disease.

3. A "therapist" (which includes a physician) "who intentionally has sexual contact with a patient ... during any ongoing therapist-patient ... relationship" is guilty of a class D felony. Sec. 940.22(2), Stats.

4. Lindh killed two county employees and attempted to kill an employee of the state's justice department.

A reasonable possibility exists that the error contributed to the jury's finding that Lindh did not suffer from a mental disease at the time of the shootings. That being the case, we cannot find that the error was harmless. *State v. Dyess*, 124 Wis.2d 525, 548, 370 N.W.2d 222, 231–32 (1985).

We conclude the second phase of the bifurcated proceeding must be retried. We do not reach the issue whether the error deprived Lindh of his rights under the confrontation clause of the sixth amendment. *See Id.* at 533, 370 N.W.2d at 227 (appellate court need not address claim of constitutional error if relief available on statutory or common law grounds).

Judgment reversed and cause remanded for a new trial as to whether Lindh is not guilty of the charges by reason of mental disease or defect.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS
THAT THIS CASE INVOLVES

Constitutional Provisions

Article I, § 9, ¶ 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

Article III:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at state Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

Article VI, ¶2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Amendment XIV:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Statutory Provisions

HABEAS CORPUS STATUTES — 28 U.S.C. §§ 2241-2266

[As amended through April 1996]

[Provisions added by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I (1996), enacted on April 24, 1996, are indicated by redline; provisions deleted by the Act are indicated by strikeout.]

Sec.

2241. Power to grant writ.
2242. Application.
2243. Issuance of writ; return; hearing; decision.
2244. Finality of determination.
2245. Certificate of trial judge admissible in evidence.
2246. Evidence; depositions; affidavits.
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2249. Certified copies of indictment, plea and judgment; duty of respondent.
2250. Indigent petitioner entitled to documents without cost.
2251. Stay of State court proceedings.
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2254. State custody; remedies in Federal courts.
2255. Federal custody; remedies on motion attacking sentence.
2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.
2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.
2263. Filing of habeas corpus application; time requirements; tolling rules.
2264. Scope of Federal review; district court adjudications.
2265. Application to State unitary review procedure.
2266. Limitation periods for determining applications and motions.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless —

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus ~~and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.~~, except as provided in section 2255.

~~(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.~~

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim shall not be counted toward any period of limitation under this subsection.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

§ 2248. Return or answer; conclusiveness

The allegation of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

§ 2251. Stay of State court proceedings

A justice or judge of the United State before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

§ 2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless

from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

~~(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —~~

~~(1) that the merits of the factual dispute were not resolved in the State court hearing;~~
~~(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;~~
~~(3) that the material facts were not adequately developed at the State court hearing;~~
~~(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;~~
~~(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;~~
~~(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or~~
~~(7) that the applicant was otherwise denied due process of law in the State court proceeding;~~
~~(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:~~

~~And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant,~~

~~otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.~~

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

~~(e)~~(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

~~(f)~~(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

~~A motion for such relief may be made at any time.~~

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

~~The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.~~

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

§ 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

§ 2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review

applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for a movant who is or becomes financially unable to afford counsel shall be in the discretion of the court, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

§ 2264. Scope of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

§ 2265. Application to State unitary review procedure

(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'post-conviction review' and 'direct review' in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to 'an order under section 2261(c)' shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

§ 2266. Limitation periods for determining applications and motions

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case, that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (I) to the Director of

the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall

not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

[The foregoing provisions relating to special habeas corpus procedures in capital cases "shall apply to cases pending on or after the date of enactment of this Act." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, § 107(c) (1996) (enacted Apr. 24, 1996).]

STATUTE ON COUNSEL IN DEATH PENALTY CASES — 21 U.S.C. § 848(q)

[Provisions added by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I (1996), enacted on April 24, 1996, are indicated by redline; provisions deleted by the Act are indicated by strikeout.]

21 U.S.C. § 848(q):

(4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either --:

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications[] for writ of

certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) ~~Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.~~ Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

96-6293

No. 96-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5(b), I hereby certify that on the 9th day of October, 1996, I placed three copies of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in the above-captioned case and one copy of a Motion to Proceed In Forma Pauperis in the United States Mail, first-class postage prepaid, addressed as follows:

Hon. Sally L. Wellman
Assistant Attorney General of the State of Wisconsin
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857

I further declare that all parties required to be served have been served.

JAMES S. LIEBMAN
ATTORNEY FOR PETITIONER

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
DEC 4 1996
CLERK

No. 96-6298

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. Petitioner's statement and discussion of the issue presented reveals a serious miscomprehension of both controlling case law and the instant decision of the seventh circuit. Therefore, this is an inappropriate case for this court to accept to resolve any questions about the applicability of the provisions of the Antiterrorism and Effective Death Penalty Act at issue. 11

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No. 96-6298

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts material to the consideration of the questions presented are not fully set out in petitioner's statement of the case, which provides an abbreviated discussion of the state court's decision and which includes facts which are not in the record. The relevant facts are presented in the decision of the Wisconsin Supreme Court. Petitioner never took issue with the facts related in that decision until he filed his supplemental brief on the applicability of the Antiterrorism and Effective Death Penalty Act in the seventh circuit, which occurred long after briefing and after oral argument before the panel on his appeal. As the seventh circuit correctly stated, his complaint came too late. Lindh v. Murphy, 96 F.3d 856, 867 (7th Cir. 1996).

STATEMENT OF FACTS

The following facts as set forth by the Wisconsin Supreme Court in its published opinion must be accepted by this Court as the facts governing this case. The opinion is published at 468 N.W.2d 168 (Wis. 1991). A copy of the opinion is also contained in Lindh's separate appendix to his petition as Appendix C. A copy of the opinion constituted Exhibit L in the state's response to the petition for writ of habeas corpus in the district court. Subsequent citations in this brief to the Wisconsin Supreme Court's opinion will be to the published opinion found at 468 N.W.2d 168.[1]

The Wisconsin Supreme Court related the facts involving the crimes and the fact that the Dane County District Attorney's office contacted Dr. Roberts and he interviewed Lindh in the hospital on the night of the crimes, January 15, 1988. The Wisconsin Supreme Court then found the following facts relevant to the confrontation clause issue:

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[1]The district court agreed to decide the legal issue of whether the confrontation clause applied at the insanity phase of trial first because if the state won on that issue, the court would not reach the merits of the alleged constitutional claim and it would not be necessary for the state to absorb the expense of copying, serving and filing the voluminous transcripts. The court then elected to resolve the case on the merits of the cross-examination claim. Petitioner has not contested the facts found by the Wisconsin Supreme Court under 28 U.S.C. § 2254(d); the facts relied on by the state supreme court are contained in the briefs of the parties which were filed in the district court; those briefs cite to the trial court record. Petitioner did not timely claim that any facts asserted in the state's briefs or stated in the Wisconsin Supreme Court opinion are not contained in the trial court record. Nor did he timely claim that the state supreme court ignored or misrepresented facts in the state court record. To the extent petitioner is now quibbling about the state supreme court's findings of fact regarding whether Dr. Roberts was suspended, his complaint comes far too late.

> On February 26, 1988, Lindh was arraigned and entered his pleas of not guilty and not guilty by reason of mental disease. At the request of the district attorney, the court appointed Dr. Roberts and Dr. Frederick Fosdal, another forensic psychiatrist, to examine the defendant on behalf of the state.
>
> On March 8, 1988, Dr. Roberts became aware of allegations of professional misconduct against him. Specifically, he became aware that the University of Wisconsin Hospital was investigating an allegation that he had engaged in sexual misconduct with a female patient. He gave no particular thought at the time to the fact that there was a potential for a criminal charge to be made against him and that such a charge could involve the Dane County District Attorney's office. However, he generally knew at the time about the existence of a state law which could subject him, as a therapist, to criminal penalties if such an allegation as that made against him were true. He was not aware of what penalty could be prescribed if he were charged and convicted. He presumed that, were any prosecution to be carried out, it would happen in Dane county, where the allegations were made and therefore would be conducted by the Dane county district attorney's office.
>
> In May 1988, Dr. Roberts learned that the Medical Examining Board was also investigating allegations of sexual misconduct by him with three female patients after the examining board made a request of him to provide it with records.
>
> Dr. Roberts interviewed Lindh again on June 22, 1988, at the Dane county jail. The next day, June 23, University of Wisconsin Hospital attorneys met with Dane County District Attorney Hal Harlowe and referred to him the allegations against Dr. Roberts. At the same meeting, Harlowe informed those attorneys that he would transfer the matter to a special prosecutor. After the meeting, Harlowe immediately undertook to transfer the matter to the office of Milwaukee County District Attorney E. Michael McCann so as to establish that office as special prosecutor in the matter.
>
> The Dane county district attorney's office sought this transfer in light of the fact that it had worked closely with Dr. Roberts on the prosecution of a number of past and pending cases. The district attorney's office considered that that relationship could constitute a conflict of interest for both Dr. Roberts and the district attorney's office if it were to investigate or prosecute Dr. Roberts. The Dane county circuit court officially appointed the Milwaukee county district

attorney's office as special prosecutor on June 28 or 29, 1988.

Dr. Roberts was never contacted by any member or representative of the Dane county district attorney's office, nor was he contacted by any police officer, concerning the allegations against him. Nor did anyone from the Dane county district attorney's office have any contact with Dr. Roberts' attorney about the allegations. Not until July 8, 1988, did Dr. Roberts become aware, through his attorney, that allegations had been referred to the Dane county district's [sic] office; at the same time, he became aware that the special prosecutor already had been appointed.

No formal or informal decision was made by the Dane county district attorney's office as to whether any criminal investigation or charges should be made against Dr. Roberts prior to the appointment of the special prosecutor. No one from the Dane county district attorney's office had any contact with the special prosecutor or discussed the matter with the special prosecutor after the special prosecutor appointment.

On August 17, 1988, Dr. Roberts submitted a report concluding that Lindh was not suffering from a mental disease or defect at the time of the shootings. On August 22, 1988, he interviewed Lindh for the last time.

On September 7, 1988, the defense filed a "Specific Demand for Exculpatory Evidence" regarding the complaint against Dr. Roberts before the Medical Examining Board. The complaint was attached to the discovery demand in which the defense set forth a list of specific questions to be answered, including questions as to when Dr. Roberts first became aware that the allegations had been made; when he was first aware the allegations could result in criminal charges; when the allegations were referred to the Dane county district attorney's office; when a special prosecutor was appointed, when Dr. Roberts became aware of this; and whether the Dane county district attorney's office had made any decision as to whether charges should be filed.

The state promptly responded to the demand, denying that any of the material requested was exculpatory but fully answering each and every question set forth by the defense.[6] The state also filed, on September 12, 1988, a motion in limine requesting that the trial court prohibit any cross-examination of Dr. Roberts concerning the allegations of misconduct pending against him or concerning any ramification of those pending allegations, including but not limited to the status of Dr. Roberts' hospital privilege at the University of Wisconsin

Hospital. The motion asserted that any such inquiry by the defense would be "totally irrelevant and immaterial to the issues" before the court.

A hearing on the state's motion was held on September 13, 1988. At that hearing, the defense acknowledged that the state had fully complied with its discovery demand. It also indicated it was alleging no wrongdoing or bad faith on the part of the prosecution. The parties argued the merits of the state's motion, the defense arguing that the circumstances raised serious questions relating to the bias, motive and interest of Dr. Roberts. The defense also argued more generally that Lindh should be permitted to explore the credibility of Dr. Roberts as an expert witness. In this connection, the defense, although it had no support in the record upon which to base its position, asserted that University of Wisconsin Hospital had temporarily suspended Dr. Roberts' privilege to treat patients at that institution after conducting its own investigation. Lindh argued that he should be permitted, during his own questioning on Dr. Roberts' qualifications, to question Dr. Roberts concerning the allegations against him and his purported suspension so that the prosecution would not be able to present Dr. Roberts as "pure as the driven snow."

The state argued that the allegations contained in the board's complaint were not relevant to the issues of bias, motive or interest. The state argued that the allegations did not go to bias because when Dr. Roberts was retained and appointed, the prosecution was not looking to him for any particular result from his evaluation of Lindh but simply his professional opinion. In this regard, the state noted that some five weeks prior to the filing of his report Dr. Roberts was aware that a special prosecutor had been appointed and that the Dane county district attorney's office had absolutely no involvement with the case. The prosecutor argued it was too implausible to think Dr. Roberts would file a report with the hope that it would help him in Dane county when he knew that the matter was under Milwaukee county jurisdiction. Even if the proffered evidence were marginally relevant, the state said, it would be extremely prejudicial and cause the jury to focus on an issue unrelated to the question of Lindh's mental capacity at the time of the shootings, and therefore should not be allowed.

Concerning the defense's more generally stated line of inquiry as to Dr. Roberts' character or credibility as an expert witness, the state responded that an expert witness should be treated like any other witness and that there was no basis to question Dr. Roberts about the allegations. The state argued that cross-examination

pertaining to the allegations of sexual misconduct and purported hospital suspension would serve no purpose insofar as those matters did not reflect on Dr. Roberts' qualifications as an expert witness. Such cross-examination, the prosecution said, would serve only to "trash" Dr. Roberts, to put him on trial and draw the issue away from the mental responsibility of Lindh.

Following extensive arguments by the parties, the trial court, after having "given a lot of thought to this," found the proffered evidence to be "irrelevant and immaterial." Rejecting the defense's theories of relevancy, the trial court expressly considered that, particularly given that the matter of the allegations against Dr. Roberts was transferred "almost instantaneous[ly]" out of the Dane county district attorney's office to the office of the special prosecutor, there was no possibility of bias, motive or interest on the part of Dr. Roberts. "I do not find anything in this record which would support or permit counsel to inquire as to [that issue]," the court said. The trial court added:

> And I think it's fair to say that, no matter what [Dr. Roberts does] for the Dane county district attorney's office, [he] would not be able to influence any result, as a result of [the special prosecutor's] investigation or any judge that might ultimately hear it, should there be any criminal charges filed.

Even though it had already found the proffered evidence not relevant, the trial court apparently assumed for the sake of argument that the proffered evidence might be at least marginally relevant such that it should be "balanced" against the risk of unfair prejudice so as to determine its admissibility pursuant to sec. 904.03, Stats. In conducting its balancing test, the trial court found that the risk of unfair prejudice to the state would outweigh any relevance. The court expressly noted that the allegations against Dr. Roberts were nothing more than allegations and said that there was the risk that the jury would think that "if there's smoke, there's fire." Thus, the court held that cross-examination pertaining to the allegations against Dr. Roberts and his purported hospital suspension was not admissible. The court therefore granted the motion in limine.

At the same time, the court gave defense counsel the right to voir dire Dr. Roberts outside the presence of the jury, and a voir dire hearing took place before Dr. Roberts testified at phase II of the trial. The hearing essentially amounted to a reiteration by Dr. Roberts of much of the information contained in his response to

Lindh's discovery demand. In addition, Dr. Roberts stated at the hearing that when he was first called into the case by Assistant District Attorney Burr he was not aware that any allegations against him were threatened. He also stated that he was not aware that District Attorney Harlowe had met with University of Wisconsin Hospital attorneys until the date of the hearing. The defense did not dispute these statements by Dr. Roberts. Based upon the voir dire hearing, the trial court found no basis to alter its ruling granting the motion in limine.

At phase II, Dr. Ezra Griffith, a forensic psychiatrist, testified for the defense. After giving a lengthy introduction as to his professional qualifications and background, Dr. Griffith testified to a reasonable degree of medical certainty that on the day of the killings the defendant was in a psychotic state which he diagnosed as a "brief reactive psychosis," and that as a result of that psychotic state Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct and lacked substantial capacity to conform his conduct to the requirements of law. He also testified to a reasonable degree of medical certainty that Lindh had been suffering from mental diseases or disorders long before January 15, 1988. He characterized these long-term disorders as "mixed personalty disorder."

The principal expert witness for the state was Dr. Roberts. At the outset of his testimony, Dr. Roberts indicated that he was: a faculty member at the University of Wisconsin Medical School; "on the adjunct faculty at San Francisco Theological Seminary;" chairperson of conferences "relating to religion and mental health;" previously "honored . . . as essentially the mid-west psychiatrist of the year;" and, a grandfather. Dr. Roberts proceeded to give his opinion that the defendant did not suffer a mental illness at the time of the crimes, that a personality disorder is not a mental disease, and that a conduct disorder is not a mental disease. He testified to his opinion that the defendant was not suffering a brief reactive psychosis at the time of the offenses. He gave his opinion that the defendant knew his conduct was wrong and that he could conform his conduct to the requirements of the law.

The state also called Dr. Fosdal who stated that he diagnosed Lindh as suffering a mixed personality disorder. He testified, however, that such a disorder does not prevent one from appreciating the wrongfulness of his conduct or from conforming his conduct to the requirements of the law. He testified to his opinion that the defendant did not suffer a brief reactive psychosis at the time of the crimes, did not have a

mental disease, and suffered no impairment of his ability to conform his conduct to the requirements of the law.

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6. The information contained in the state's answers, entirely undisputed by the defense, is incorporated within this factual portion of this opinion.

State v. Lindh, 468 N.W.2d 168, 171-75 (Wis. 1991) (footnotes omitted, with the exception of n.6).

In the course of addressing the issues, the Wisconsin Supreme Court rendered the following additional determinations:

> From the time Dr. Roberts first interviewed Lindh in the hospital on January 15, 1988, through the times that he interviewed him in June 1988 and August 1988 and up through and including September 1988, there is no evidence in the record that a criminal investigation was being conducted--or, indeed, that one ever was conducted--regarding any allegations against Dr. Roberts. At most, it is known that the matter of the complaints by Dr. Roberts' patients against him was referred to the Dane county district attorney's office in June and that the matter was immediately transferred to the Milwaukee county district attorney's office for any investigation it would choose to pursue and any prosecution it would choose to conduct. There is no evidence that after that time and as of the time of trial, the Milwaukee county district attorney's office ever began any criminal investigation.[11]

Clearly, up until July 8, 1988, there was no reasonable possibility for bias, motive or interest on the part of Dr. Roberts because until that date he did not know that any allegations had been referred to the Dane county district attorney's office. Because Dr. Roberts became aware of the immediate transfer of the matter to the special prosecutor at the same time, he had no reason to believe after July 8, 1988, that the Dane county district attorney's office would be in a position to prosecute him and thus possibly favor him in exchange for his testimony. Dane county was not in a position to make any "deals," reduce any charges, or even make any recommendation as to any criminal investigation or prosecution against Dr. Roberts and Dr. Roberts knew it. He therefore had no reason to favor the prosecutor in the instant case by testifying or giving a report favorable to him.

The relationship between the Dane county district attorney's office and Dr. Roberts which would be necessary to suggest bias, interest or motive simply did not exist. The disclosure provided by the prosecutor upon the request of the defense and the voir dire of Dr. Roberts unequivocally showed the same thing. There is no reason whatsoever to conclude that there was fertile ground for even the seed of a "deal" to be sewn and to germinate under these circumstances. To suggest that Dr. Roberts' testimony would be influenced in favor of the prosecution under these circumstances amounts to mere speculation. There being no nexus between the future criminal investigation and prosecution of Dr. Roberts, if any were to be undertaken, and the Dane county district attorney's office, a jury could not reasonably find a logical connection between the two, because none existed. Thus, it was not an abuse of discretion not to allow the matter to be brought up on cross-examination.

. . . .

Lindh does not expose a "prototypical form of bias." Here, the prosecution had not dropped any pending criminal charges against Dr. Roberts, no charges had been reduced or favorably disposed, and Dr. Roberts was not on parole or probation or in custody. There was only the possibility that allegations of sexual misconduct with patients could form the basis of criminal charges. There is not even any claim that a criminal investigation was actually being conducted. Because substantial steps were taken immediately by the Dane county district attorney's office to appoint the special prosecutor upon the referral of the investigation of Dr. Roberts to the district attorney's office, Dr. Roberts had no "prototypical" bias, interest or motive to curry favor with the Dane county district attorney's office which was prosecuting Lindh, because any charges that would be brought against Roberts would be brought by the special prosecutor.

. . . .

Far from presenting himself as "pure as the driven snow," as the defense asserts he did, Dr. Roberts simply testified to his past experience and professional background, as do all expert witnesses. The fact that he offered certain innocuous family information without objection from the defendant does not mean that Lindh had a right to cross-examine on the matter of the sexual misconduct allegations.

Dr. Roberts' introduction was qualitatively no different from that of defense psychiatric expert Dr. Griffith, who testified he was: acting director of

Connecticut Mental Health Center in New Haven, Connecticut, and was associate professor of psychiatry at Yale University School of Medicine and an associate professor in the Department of Afro-American studies at Yale. Dr. Griffith also testified that he went to Harvard University, took his medical degree at University of Strasburg in France, did residency at the Albert Einstein College of Medicine in New York, that he has a specialty certification in psychiatry and forensic psychiatry, that he teaches a course in the department of Afro-American studies that has to do with the psychological dimensions of black autobiographies, that he is a consultant to the Pan American National Health Organization, Project Hope, and the Commission of Security and Cooperation in Europe of the United States Congress, that he is editor of Black Psychiatrists of Americans Quarterly, that he is on the executive committee of the Black Psychiatrists of America, that he was honored by a fellowship of American Psychiatric Association and received a traveling fellowship from the Solomon Fuller Institute, that he serves on various boards, and that he has authored a number of articles.

. . . .

In the instant case, the risk of unfair prejudice was great. Allegations of sexual misconduct with patients against a psychiatrist have great potential to unduly prejudice the jury against the witness. Cross-examination on this matter would have distracted the jury from the real issues in the case and would have caused the jury to speculate about unproven charges against the witness. A mini-trial on Dr. Roberts' conduct could have ensued.

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11. An investigation of Dr. Roberts eventually was undertaken by the special prosecutor who brought charges against Dr. Roberts. Dr. Roberts pleaded no contest to these charges. Although the record does not indicate the exact dates of these events, it is clear that they all occurred subsequent to Dr. Roberts' testimony at phase II of Lindh's trial.

Lindh, 468 N.W.2d at 177-82 (footnotes omitted, with the exception of n.11).

ARGUMENT

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant Review Of The Issue Of Whether The Seventh Circuit Correctly Concluded That The Provision Of The Antiterrorism And Effective Death Penalty Act Of 1996, Which Limits When Habeas Corpus Relief May Be Granted (28 U.S.C. Sec. 2254(d)), Applies To Cases Pending On The Date Of Enactment Because: (1) Petitioner Creates Phantom Issues By Misconstruing The Seventh Circuit Decision And Controlling Case Law And (2) Petitioner Has Failed To Demonstrate That There Is A Significant Split In The Lower Courts On The Issue Presented.

A. Petitioner's statement and discussion of the issue presented reveals a serious miscomprehension of both controlling case law and the instant decision of the seventh circuit. Therefore, this is an inappropriate case for this court to accept to resolve any questions about the applicability of the provisions of the Antiterrorism and Effective Death Penalty Act at issue.

Petitioner's statement and discussion of the issue presented reveals a serious miscomprehension of both controlling case law and the instant decision of the United States Court of Appeals for the Seventh Circuit. Therefore, this is an inappropriate case for this court to accept to resolve any questions about the applicability of the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 at issue because this case obscures the issues.

The seventh circuit's en banc decision in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), held that the 1996 amendments to the federal habeas statute, which limit when habeas relief may be granted, apply to pending cases. Petitioner challenges the seventh circuit's decision as inconsistent with this Court's decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994). However, petitioner is able to make this argument only because he

misconstrues both this Court's decision in Landgraf and the seventh circuit's decision in this case.

First, petitioner misconstrues Landgraf. For example, he states that Landgraf held that unless Congress makes "a contrary intent clear, a presumption of prospective application only would prevail" (Petition at 15). That is a total misreading of Landgraf. Petitioner is able to misread Landgraf to this degree only because he insists on equating application of a statute to pending cases with retroactivity. But this Court in Landgraf unequivocally rejected any such equation.

The seventh circuit quite correctly followed the analysis and teaching of Landgraf. When a court is faced with the question of whether a newly enacted statute applies to a case pending before the court, the court must first ask whether Congress directly identifies in the law the cases to which the new provision applies. If Congress expressly provides that a new provision does or does not apply to pending cases, then the court must follow that directive.

The seventh circuit correctly answered that first question in the negative: Congress did not expressly provide whether the new sec. 2254(d) applies to pending non-capital cases. Lindh v. Murphy, 96 F.3d at 861-62. Following the approach adopted by this Court, the seventh circuit quite reasonably rejected the argument that because Congress specifically provided that some parts of the Antiterrorism and Effective Death Penalty Act apply to cases pending on or after the date of enactment, that meant that no other provisions apply on the date of enactment. The seventh circuit

properly held that an indirect, negative inference is not a direct statement of Congress's intent.

When, as here, Congress is silent on the applicability of a particular provision, the court should apply the law existing at the time it renders its decision, unless to do so would result in manifest injustice. A manifest injustice results if application of the new law to a pending case would have a retroactive effect on the parties. Landgraf, 511 U.S. at 265-70; Lindh, 96 F.3d at 861-63. A retroactive effect has a narrow meaning--it does not include any application to a case arising before enactment. A new provision has a retroactive effect only if it "attaches new legal consequences to events completed before its enactment." Landgraf, 511 U.S. at 270. "New legal consequences" that give a provision retroactive effect is a term of art; it does not include every type of consequence. Applications of new provisions that relate to prospective relief, new provisions conferring or ousting jurisdiction and new procedural provisions may all have new consequences in the sense that the result or even justiciability of the issue is different than it was before the new provision was enacted. Yet, these are not "new legal consequences" that give the new provision a disfavored retroactive effect. See Landgraf, 511 U.S. at 273-75.

There is no presumption against applying a new provision enacted after the events in suit: there is only a presumption against so applying a new provision if it would have a retroactive effect. A new provision has a retroactive effect if "it would impair rights a party possessed when he acted, increase a party's

liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280. Illustrations in Landgraf of statutes that have been held to have a retroactive effect are but examples of these types of consequences. These are the new legal consequences that give a statute retroactive effect.

The Lindh court properly understood this and faithfully applied Landgraf. Indeed, it is significant that petitioner does not take issue with the seventh circuit's conclusion that there should not be an immediate application of the new one-year deadline for filing a habeas petition. Lindh, 96 F.3d at 866. Petitioner finds fault with the Lindh court's application of the Landgraf principles only when he does not like the result.

Petitioner does not demonstrate that the Lindh court departs from the Landgraf analysis. He is able to criticize the decision only by inserting red herrings into the case. This Court should not be misled.

For example, petitioner claims that the seventh circuit erred by totally replacing the "new legal consequences" inquiry with a search for legitimate reliance interests. Petitioner's complaint has two flaws. First, the seventh circuit did not telescope the entire Landgraf analysis as petitioner suggests. Rather, the court looked at all the relevant factors discussed by this Court in Landgraf. Petitioner never claimed that application of new sec. 2254(d) to his case would impair any rights he possessed at the time of the crime; he did not claim that application of new sec. 2254(d) to his case would increase his liability for the crime, and

he did not claim that application of new sec. 2254(d) would impose any new duties on him with respect to transactions already completed. Understandably, the seventh circuit did not spend much time discussing those potential "new legal consequences." Petitioner did try to claim that he should get plenary review because, when the state courts decided his case, they knew the case would get plenary review by the federal courts, so the state courts were inattentive to federal rights because they wanted to look tough on crime and get re-elected. The seventh circuit wisely refused to accept such an insulting, and unfounded, view of Wisconsin state trial and appellate court judges. Lindh, 96 F.3d at 864.

The seventh circuit did look at whether new sec. 2254(d) affects substantive or procedural rights. It properly concluded that sec. 2254(d) is procedural. It affects secondary, rather than primary conduct; it speaks to the power of the court, not the rights or obligations of the parties; it focuses on prospective relief; it leaves a final, presumptively valid judgment in force, it does not disrupt that judgment. Lindh v. Murphy, 96 F.3d at 864-67. All these considerations are valid, and dispositive, under Landgraf. See Landgraf, 511 U.S. at 273-75.

The seventh circuit looked at other possible legitimate reliance interests only because petitioner offered them as a ground for not applying the new law to him. He claimed that he "relied" on the standard of review in the federal courts when he decided to file a habeas petition rather than seek review in this Court or further review in the state courts. The seventh circuit gave this

claim the short shrift it deserves, recognizing the real reason prisoners do not seek Supreme Court review is the slim likelihood that this Court will accept the case. Moreover, the court recognized that either petitioner had no avenue for further relief in the state courts when he elected to file his habeas petition, or any relief he might have would still be available. The court wisely rejected petitioner's attempts to show that he somehow had a settled expectation in the pre-amendment level of habeas review. The court's decision will not require individual fact-finding of why an individual petitioner actually filed a habeas petition in the lower federal court instead of a certiorari petition in this Court. The court's rejection of the theory that the old law dictated that choice is an across-the-board decision that, absent very unusual circumstances, would apply to any similar assertion. Most importantly, the seventh circuit soundly rejected titioner's theory that application of the new law to pending es is disfavored and would have a retroactive effect simply use the new law reduces his chances of prevailing on his habeas n. As the court wisely perceived, that result-driven test gut Landgraf.

n a desperate attempt to make this case look like the type of his Court should accept for review, petitioner invents red herring by claiming the seventh circuit invented a curtailing" presumption out of whole cloth (Petition at 20- court did nothing of the kind. It simply recognized that ges in habeas law--both statutory and common law--have een applied to pending cases. And it simply adhered to

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penalty decision overturned--where the stakes to the petitioner are highest--but not state court decisions in non-death penalty cases.

This Court should decline to accept review of this case because the decision of the en banc court of the seventh circuit is correct. The court correctly applied the Landgraf analysis. Petitioner is able to attack it only by twisting the words of this Court in Landgraf and the words of the seventh circuit in the instant case. If it is appropriate for this Court to ultimately resolve questions about the applicability of sec. 2254(d) to pending cases, it should wait and do so in a case where the issues are accurately identified and addressed by the petitioner.

B. Petitioner has failed to demonstrate that there is a significant split of authority in the lower courts on the issue presented.

Petitioner claims that the decision of the seventh circuit conflicts with those of all other courts of appeals that have addressed these issues and with a majority of district court decisions. But petitioner has failed to show a significant split in authority because the decisions he relies on do not purport to engage in a thorough and well-considered application of Landgraf. If they had, they might well have reached the same conclusion the seventh circuit reached in Lindh. Moreover, these cases were decided before Lindh, thus those courts did not have the benefit of the thoughtful and careful analysis of the seventh circuit which they might have found persuasive.

In Boria v. Keane, 90 F.3d 36 (2d Cir. 1996), oral argument was held in March, 1996; in May the court rendered its decision,

granting habeas relief. Subsequently, the state asked the court to reconsider its decision and to apply the new sec. 2254(d) to the case. It does not appear that the state brought the new statute to the court's attention before the court issued its decision. The court declined to reconsider its opinion or to apply the new standard. Making the same errors petitioner here makes, as discussed above, the court simplistically stated that it would be retroactive to apply the new statute because the petition was filed before enactment. The court misstated Landgraf, as petitioner does, by stating there is a presumption against such application in the absence of clear Congressional direction to apply the statute to pending cases.

Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996), is even less noteworthy. There, the court simply stated in a footnote that since the new law provided expressly that some provisions would apply on or after the effective date, other provisions are not applicable. Id. at 1112 n.1. The court did not even mention Landgraf. Huynh v. King, 95 F.3d 1052 (11th Cir. 1996), qualifies even less as a "significant" contrary decision. There, in a footnote, the court declined to apply the new law because neither party argued the law should be applied and the petition was filed before the effective date. Id. at 1055 n.2. The federal district court decisions petitioner relies on are even less persuasive. Grady v. Artuz, 931 F. Supp. 1048 (S.D.N.Y. 1996), disposed of the question in a footnote without even mentioning Landgraf. Id. at 1054 n.1. Warner v. United States, 926 F. Supp. 1387 (E.D. Ark. 1996), did not deal with the provision at issue here at all, indeed

it is not even a federal habeas review of a state court decision. And Cockrum v. Johnson, 934 F. Supp. 1417 (E.D. Tex. 1996), is a death penalty case which has no applicability here.

The "contrary" decisions identified by petitioner do not show a significant split in authority in the lower courts. Most of them are utterly superficial and do not even purport to apply Landgraf. Others did not expressly rule on the issue, but merely declined to apply the new law because no one argued it should be applied. A significant split in authority might exist if other circuits consider the seventh circuit's careful analysis in Lindh and reject it, but that situation does not presently exist. Petitioner cites no court that has considered and rejected the thorough analysis put forth by the seventh circuit.

To the contrary, the well-reasoned decision of the fifth circuit in Drinkard v. Johnson, 97 F.3d 751, 765 and n.19 (5th Cir. 1996), discusses Lindh and reaches the same conclusion the Lindh court reached. The fifth circuit correctly followed the Landgraf analysis, holding that unless the statute has a retroactive effect, the new statute should be applied to the case before it. Like the seventh circuit, the fifth circuit rejected a negative inference to conclude Congress had expressly directed that new sec. 2254(d) should not apply to pending cases. As did the seventh circuit, the fifth circuit recognized that the change in the law has no plausible connection to the habeas petitioner's conduct on the night of the crime. The statute goes not to the conduct of the parties, but to the power of the federal courts to grant habeas

relief to state prisoners. Drinkard, 97 F.3d at 766. The statute is procedural, not substantive.

The Drinkard court's thoughtful analysis is entirely consistent with Lindh. The only cases that have reached a contrary conclusion are superficial and ill-considered. Petitioner has failed to show a "significant split" in the lower federal courts that warrants this Court accepting his case for review.

II. This Court Should Not Grant Review Of The Issue Of Whether The Seventh Circuit Correctly Interpreted New Sec. 2254(d), Which Limits When Habeas Corpus Relief May Be Granted, Or Whether That Interpretation Violates Article III Or The Suspension Clause of The Constitution Because: (1) Petitioner Seriously Misconstrues Both The Statute And The Decision; (2) Petitioner Fails To Demonstrate That There Is A Significant Split In The Lower Courts On The Issue Presented; (3) The Decision Of The Seventh Circuit Does Not Implicate The Constitutional Concerns Raised By Petitioner, And (4) The Seventh Circuit Properly Applied The Standards To This Case.

A. Petitioner seriously misconstrues both the statute and the decision of the seventh circuit.

Again, petitioner is only able to make the instant case appear to be one worthy of this Court's review by distorting the decision of the seventh circuit and the statute.

First, it is interesting to note that in the seventh circuit, petitioner relied heavily, indeed, almost exclusively, on legislative history to interpret the meaning of new sec. 2254(d). The seventh circuit soundly rejected that approach, stating that "our task is to construe the enacted statute, not to construe its legislative history." Lindh, 96 F.3d at 868. Taking his cue from the court, petitioner now argues that the language of the statute

is plain and has an easily understood meaning (Petition at 22). He then goes on for many, many pages about the "plain" meaning of the statute. Boiled down to its essence, petitioner's real argument seems to be that "unreasonable application" should be read out of the statute. This approach alone should suggest to the Court that petitioner's attack on the seventh circuit's decision is not well-founded or well-supported. Petitioner's attempt to distort the statute provides good reason for this Court to decline this case for review.

Petitioner provides an elaborate dissertation on what this statute "plainly" means, then holds the seventh circuit's decision up and, by comparison, finds it wanting. This Court should be loathe to follow petitioner's lead. The seventh circuit's construction of the statute is correct and it gives a clear and understandable meaning to the words of the statute. Petitioner obviously cannot find fault with what the seventh circuit actually said, because he ignores what the court did say.

The seventh circuit was correct in stating: "Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." Lindh v. Murphy, 96 F.3d at 869. Moreover, the statute requires the federal court to "ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States" and that the federal court may not "permit state courts to deviate from the Constitution." Id. at 870. It is hard to

understand what disagreement petitioner could have with these statements of the court.

The seventh circuit also correctly interpreted new sec. 2254(d) to permit relief when the state court's decision reflects "an unreasonable application" of the law as established by the United States Supreme Court. Id. at 870. The federal court must leave unmolested reasonable, good faith applications of the law by the state courts. "The Supreme Court of the United States sets the bounds of what is 'reasonable'; a state decision within those limits must be respected--not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions. That is the principal change effected by § 2254(d)(1)." Id. at 871. The statute requires the federal court to give "independent federal review on pure questions of law" and to subject "mixed questions of law and fact to review for reasonableness." Id. at 873. The seventh circuit properly construed the language of new sec. 2254(d), and nothing petitioner presents casts any doubt on the correctness and validity of the court's decision.

Frankly, despite petitioner's many pages of discourse, his point remains unclear. He seems to be saying that mixed questions of law and fact must be assessed under the "contrary to law" standard, not the "unreasonable application of law" standard. He never explains what use, if any, will then be made of the

"unreasonable application of law" standard. He simply wills it out of the statute.

Petitioner interprets the statute as he wishes it had been written, not as it was written. He ignores what the seventh circuit says and instead espouses convoluted theories about what "law" and "decision" mean. His theories seem to have nothing whatsoever to do with this case or with new sec. 2254(d).

Surely, if this Court is to review questions about the proper interpretation and application of new sec. 2254(d), it should wait and do so in a case that will present the issues in a straightforward manner. Neither this Court nor respondent should be required to meander with this petitioner.

B. Petitioner fails to demonstrate that there is a significant split in the lower courts on the issue presented.

Petitioner rather rashly asserts that three federal circuits have interpreted new sec. 2254(d) "in square conflict with" the seventh circuit's decision. He is wrong. He seems to see a conflict simply because those courts granted relief to the habeas prisoner, and the seventh circuit did not. In terms of legal analysis or interpretation and application of new sec. 2254(d), there is no conflict.

Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996), can hardly represent a conflict with Lindh on the meaning and application of amended sec. 2254(d). The court stated: "Whether or not the new Act will apply to other cases on appeal, Strickland v. Washington, [466 U.S. 668 (1984),] has long been clearly established federal

law determined by the Supreme Court of the United States. We therefore conclude that our analysis in this case is not affected by § 2254(d)." Baylor, 94 F.3d at 1323. Moreover, the court found the result would be the same whether or not the new act is applied. From the opinion, it appears that the state argued only that no relief was warranted because the state court decision was not contrary to clearly established United States Supreme Court precedent. The opinion never discusses whether the state court decision was an unreasonable application of such law. It does not appear either party addressed it. Moreover, unlike the state court decision in Lindh, in which the Wisconsin Supreme Court thoroughly considered and applied Supreme Court precedent, in Baylor, the state court apparently had denied petitioner's ineffective assistance claim without citation to any authority. Thus, because Strickland is the controlling law governing such claims and the state court wholly ignored it (or any other authority), the ninth circuit concluded that the state court decision was contrary to clearly established Supreme Court law. Baylor, 94 F.3d at 1325.

In Dickerson v. Vaughn, 90 F.3d 87 (3d Cir. 1996), the court again did not discuss the meaning and application of "contrary to" and "unreasonable application." It was not necessary to do so. The state court had erroneously held that if the transcript of a guilty plea hearing indicated the petitioner said he understood the matter in question, he could not later challenge the plea. The third circuit held that United States Supreme Court precedent clearly holds that a challenge to a plea cannot be dismissed simply because there were contrary answers at the plea hearing. The state

court's per se rule was contrary to United States Supreme Court law.

Finally, petitioner's reliance on Ayala v. Speckard, 89 F.3d 91, 96-97 (2d Cir. 1996), is even less well-founded. The court stated it need not decide if the new law applied because even if it applied, the petitioner would be entitled to relief. The court then simply stated that relief is required if the state court decision is contrary to clearly established Supreme Court law and Waller v. Georgia, 467 U.S. 39 (1984), provides the clearly established law to which the state court decision is contrary.

None of the decisions petitioner cites as "contrary" to Lindh are contrary. They did not engage in any discussion of unreasonable application at all; it is not clear from the opinions what was argued below. None of these courts labeled the issue a mixed question of fact and law, but proceeded nonetheless to decide it on the basis that it was contrary to law.

Moreover, Lindh is consistent with the fifth circuit's decision in Drinkard v. Johnson:

> This "unreasonable application" standard of review of a state court decision must mean more than that a federal court may grant habeas relief based on its simple disagreement with the state court decision; this would amount to nothing more than a de novo review. See H.R.Conf.Rep. No. 518, 104th Cong., 2d Sess. 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944, 944 (indicating in no uncertain terms that § 2254(d)(1) "requires deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law" (emphasis added)). The use of the word "unreasonable" in formulating this restrictive standard of review implicitly denotes that federal courts must respect all reasonable decisions of state courts. Thus, given the statutory language, and in the light of legislative history that unequivocally establishes that Congress meant to enact deferential standards, we hold that an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.
>
> In this case, the majority has applied the law of Lockett and Eddings, using the Boyde reasonable likelihood standard, to the specific facts of this case, analyzing the special instruction standing alone and in conjunction with the general instruction, the special issues, and the arguments of counsel. The majority has unequivocally concluded that the instruction at issue did not place mitigating evidence of intoxication beyond the reach of the jury. Judge Garza, on the other hand, has concluded that the challenged instruction removed the mitigating evidence of intoxication from the jury's consideration. It follows that when the jurists considering the state court ruling disagree in this manner, the application of the law by the state court is not unreasonable. The AEDPA therefore bars us from granting relief to Drinkard on this claim.

Drinkard, 97 F.3d at 768-69.

Petitioner has failed to show a significant conflict in the circuits regarding the meaning and application of new sec. 2254(d). He has struggled valiantly to invent a conflict where none actually exists. That, alone, demonstrates why this case is not an appropriate one for the expenditure of this Court's time and resources.

C. The decision of the seventh circuit does not implicate the constitutional concerns raised by petitioner.

Petitioner reaches even further to come up with a theory under which this Court should take this case by arguing the seventh circuit's decision renders the statute unconstitutional under Article III and the Suspension Clause of the United States Constitution (Petition at 31, et seq.). His argument, once again,

is misleading. First, he states that it is the seventh circuit's "vexed reading" of the statute that forced it to consider whether the statute violates Article III. But the seventh circuit did not consider Article III because its interpretation of the statute forced it to; it considered Article III because petitioner raised the issue. Next, petitioner states that the seventh circuit decision holds that federal judges must leave a state decision in force and effect even when it is contrary to the supreme law of the land. The seventh circuit said no such thing.

The seventh circuit simply recognized that in this, as in other areas, Congress may limit the conditions under which relief may be granted in a class of cases, such as habeas cases. That is all Congress has done. And in doing so, Congress has not deprived the federal judiciary of any constitutionally granted power. Nor does new sec. 2254(d), as interpreted by the seventh circuit, suspend the writ. The seventh circuit hit the nail on the head when it labeled petitioner's suspension clause argument "feckless." Lindh, 96 F.3d at 867.

D. The seventh circuit properly applied the standards to this case.

Once the smokescreens are cleared away, petitioner has no claim that should convince this Court to review his case. Apparently he admits as much, for he presents no argument that the Wisconsin Supreme Court's decision is contrary to clearly established Supreme Court precedent or that it is an unreasonable application of such precedent.

CONCLUSION

For all of these reasons, this Court should deny the writ of certiorari and decline to review the decision of the seventh circuit.

Respectfully submitted,

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No. 96-6298 (5)

Supreme Court, U.S.
FILED
FEB 27 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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8/24/92	RESPONSE by respondent James Murphy
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10/20/92	ORDER by Senior Judge John W. Reynolds That this case is TRANSFERRED to Judge Randa. Case reassigned to Judge Rudolph T. Randa
10/4/95	DECISION AND ORDER: by Judge Rudolph T. Randa denying PETITION FOR WRIT OF HABEAS CORPUS
10/4/95	JUDGMENT
10/30/95	NOTICE OF APPEAL by petition Aaron Lindh from USDC decision and order
11/1/95	DECISION AND ORDER: by Judge Rudolph T. Randa: Request for a certificate of probable cause for Aaron Lindh is GRANTED.
5/21/96	MOTION by petitioner Aaron Lindh to SUPPLEMENT the Record on Appeal.
5/21/96	STIPULATION to Supplement the Record.
5/23/96	DECISION AND ORDER by Judge Rudolph T. Randa: IT IS HEREBY ORDERED THAT: The Clerk of Court shall supplement the appeal record as outlined in the stipulation filed May 21, 1996.
5/31/96	MOTION by petitioner Aaron Lindh to ADDITIONALLY SUPPLEMENT Record on Appeal.

6/7/96 BRIEF by respondent James Murphy in opposition to motion to ADDITIONALLY SUPPLEMENT [26-1] the record on appeal.

6/10/96 BRIEF by respondent in opposition to motion to ADDITIONALLY SUPPLEMENT

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6/19/96 DECISION AND ORDER by Judge Rudolph T. Randa denying petitioner's motion to ADDITIONALLY SUPPLEMENT the record on appeal

10/10/96 MANDATE/CERTIFIED COPY from the USCA;

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 89-0896-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON J. LINDH,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT
FOR DANE COUNTY,
THE HONORABLE ROBERT R. PEKOWSKY, PRESIDING

BRIEF AND APPENDIX OF THE APPELLANT

• • •

STATEMENT OF FACTS[1]

Sometime during the lunch hour on January 15, 1988, Aaron Lindh walked into the ground floor of the City-County Building in Madison, Wisconsin. He was carrying a shotgun, shot three people that he did not know, and

---

[1] For the convenience of the court, a chronological listing of the facts which Appellant considers most significant is set forth in table form in the Appendix to this brief at p. 123.

then begged police officers to kill him. He almost got his wish.

Deputy Sheriff Louis Molnar ordered Lindh to stop and put down the shotgun, but Lindh continued to advance, pointing his weapon at the officer's head, indicating he intended to shoot and kill the officer unless he himself was shot and killed. Deputy Molnar repeated his demand to lay down the weapon two or three more times, but Lindh continued to advance shouting "Shoot me! Kill me!" Deputy Molnar fired two shots simultaneously with Lindh's discharge of his weapon (117:264). Lindh, who lay wounded on the floor, was immediately handcuffed and transported to Methodist Hospital (111:45; 117:227,265).

The three victims of this tragic rampage were Clyde "Bud" Chamberlain, Dane County Coroner, who was shot in his office on the ground floor of the City-County Building (117:183-198); Eleanor Townsend, a clerk-typist, who happened to come to the ground floor because she was taking papers from her fourth floor office to the Sheriff's Department (117:74, 110-101); and Eric Erickson, personnel officer from the Wisconsin Department of Justice, who was shot by Lindh after he came to the City-County Building during his lunch hour to pay a parking ticket (117:95-101). Coroner Chamberlain died on the floor of his office soon after he was shot (1:8). Eleanor Townsend was taken to Madison General Hospital, where she died from the gunshot wound at approximately 2:30 p.m. (1:7). Mr. Erickson, though seriously wounded, was taken to the Madison General Hospital emergency room, where he was treated and survived the shooting (1:6).

Later in the afternoon on the day of the shooting, Assistant District Attorney John Burr, who would later be lead counsel in the prosecution of Aaron Lindh, contacted and retained Doctor Leigh Roberts because Mr. Burr considered Dr. Roberts to be "one of the best forensic psychiatrists around" (115:45; 125:88). Dr. Roberts was alerted that there had been a shooting, that Mr. Lindh had been taken into custody, and that questions might be raised regarding his mental state during the shooting (111:13).

In the meantime, Aaron Lindh, who had been transported to Methodist Hospital, was placed under general anesthesia and underwent major surgery for 2 to 2-1/2 hours. The surgery ended at approximately 3:30 p.m., whereupon Lindh was sedated and taken to the intensive care unit, where he received further pain medication (111:34-37).

At 8:34 p.m. that same evening, Aaron Lindh was interrogated by two detectives from the Madison Police Department (111:48). At that time he was still confined in the intensive care unit (111:47), with two uniformed guards outside his room (111:54). The Madison detectives identified themselves, showed their badge and identification, and explained that they wanted to talk to him about the events in the City-County Building earlier that day. They gave Lindh a complete set of *Miranda* warnings, and questioned him for approximately 35 minutes (111:49-54). The Madison police detectives concluded their interview at 9:05 p.m., when Lindh said that he was thirsty and that he was starting to feel some pain (111:56).

At 9 p.m. that evening, the District Attorney's office contacted Dr. Leigh Roberts at his home and requested

that he visit Aaron Lindh at the intensive care unit of the Methodist Hospital (111:13). Dr. Roberts arrived at Lindh's bedside at 9:33 p.m. Lindh was confined by three leather restraints, looked tired and physically ill. He had a variety of hospital-type apparatus connected to him, including oxygen, a nasogastric tube, a catheter, a tube in his chest, and IV's in place. He gave Dr. Roberts the overall appearance of an ill person, someone who looked uncomfortable (111:14-15). Dr. Roberts explained to Lindh that Assistant District Attorney Burr had sent him; that any discussions were not confidential; and that anything reported could subsequently be reported to other persons since the interview was taking place "at the request of the District Attorney's office" (111:15).

Dr. Roberts explained that Lindh did not have to speak with him, he asked if Lindh had an attorney, and was informed that he did not (11:15). He asked if Lindh wanted an attorney before he spoke, and Lindh indicated that he did not. *Id.* Dr. Roberts asked Lindh if he understood that he was giving up his right to have an attorney before talking with him if he did talk with him, and Lindh indicated that he understood that (111:16). Dr. Roberts did not indicate that if Lindh couldn't afford to hire an attorney, one would be provided for him before any interview (111:17).

Dr. Roberts asked if Lindh was able to recall what had happened earlier in the day at the City-County Building. Lindh indicated that he limited [sic] amount of recall, but that he remembered shooting three people, two men and a woman. When Dr. Roberts asked why, Lindh responded that he didn't really know. Dr. Roberts asked Lindh whether he cared to discuss the details, and at that

point Lindh indicated he did not want to discuss the details at that time (111:17-18). At that point Dr. Roberts told Lindh that he might want to reconsider whether he wanted to talk with me at all, since he did not have a lawyer. Lindh did not respond, but closed his eyes.[2] Dr. Roberts then said, "Well, I'll wait a few minutes and come back and talk with you again." Dr. Roberts then left the room. This occurred at approximately 9:43 p.m., ten minutes after Dr. Roberts had arrived at Lindh's bedside (111:18).

Twelve minutes later, Dr. Roberts returned to Lindh's bedside. He prefaced further questioning of Lindh with an explanation of his purpose and of Lindh's rights, but this time, in a more cursory fashion:

> Again, I indicated to him, and went through, did he understand why I was there, did he understand he didn't have to talk to me. *We did not go through all of those matters.* But, again, he affirmed that he did have the understanding that he did not have to talk with me, that it wasn't confidential if he did talk. I mentioned,

---

[2] At trial, after an unsuccessful defense attempt to suppress statements based upon this assertion of the right to remain silence [sic], Dr. Roberts varied his testimony about these events. At trial, Dr. Roberts maintained that, immediately after he had asked Lindh whether he cared to discuss the details, Lindh closed his eyes and gave no affirmative response: "he then closed his eyes, *did not give an affirmation* to wanting to discuss those details." (125:24) (emphasis supplied) At trial, Dr. Roberts also volunteered during his narrative answer to another question that Lindh "had not really refused to talk with me . . . " (125:25).

again, his attorney, and his not having an attorney, and did he want one before we talked. And he indicated, then, he would talk with me.

(111:19) (emphasis supplied).

Dr. Roberts then asked Lindh a series of questions initially focusing on background information about his family and avoiding questions relating to the details of what had happened that afternoon. But Dr. Roberts soon returned to the details of the events at the City-County Building. Dr. Roberts elicited from Lindh the circumstances preceding the murders, Lindh's agitation about police handling of a robbery of his apartment, the details of the shooting, Lindh's current and recent mental state, the presence or absence of any suicidal feelings, significant depression, hallucination, voices or visions (111:19-21). Later, at trial, Dr. Roberts would suggest that this information taken from Lindh within hours of the shooting, gave to him a significant advantage over the other psychiatrists in diagnosing Lindh's mental state at the time of the shooting.

On February 26, 1988, Aaron Lindh was arraigned, and entered pleas of not guilty and not guilty by reason of mental disease or defect. At the request of the district attorney, the court appointed Drs. Roberts and Fosdal to examine the defendant on behalf of the state (20:1; 109:5,8).

From March 8, 1988, onward, Dr. Roberts became increasingly aware of serious allegations of misconduct on his part which could result in severe damage to his professional reputation, loss of his license, and Dane County felon charges. On that date, Dr. Roberts first

became aware that University of Wisconsin Hospitals were investigating an allegation that he had engaged in sexual misconduct with a female patient (69:1-2; 123:121-122; App. 112-113). Dr. Roberts also knew about the existence of sec. 940.22, Wis. Stats., which provides criminal penalties for the sexual exploitation of a patient or client by a therapist. He presumed that the prosecution of the statute would be in the same county where the events took place, so that any prosecution for violation of this statute arising out of the allegations made against him would be done in the Dane County District Attorney's office (123:124-125).

Sometime in May 1988, Dr. Roberts learned that the Medical Examining Board was also investigating charges of his sexual misconduct with a patient when the Examining Board made a request of him to provide them with records and there was reference to the complaint in the board's correspondence to Dr. Roberts (123:123-124).

On June 22, 1988, Dr. Roberts interviewed Aaron Lindh again, this time in the Dane County jail (125:89).

The very next day, on June 23, 1989 [sic], the investigation of Dr. Roberts' sexual misconduct was referred to the Dane County District Attorney's Office. The District Attorney immediately made efforts to refer the case to a special prosecutor because of a conflict of interest and a special prosecutor was formally appointed by the Dane County Circuit Court on Jun [sic] 29, 1989 [sic] (69:2; 123:125; App. 113). Dr. Roberts did not learn of the special prosecutor's appointment until July 8, 1988 (123:125).

On August 17, 1988, Dr. Roberts submitted a report concluding that Lindh was not suffering from a mental

disease or defect on January 15, 1988 (125:94). On August 22, 1988, he interviewed Lindh again (125:31).

On September 7, 1988, attorneys for Aaron Lindh filed with the Circuit Court and served upon the District Attorney a Specific Demand for Exculpatory Evidence. The demand was occasioned [sic] by the public revelation of disciplinary proceedings against Dr. Roberts before the Medical Examining Board. The complaint before the Medical Examining Board, which was by then a matter of public record (115:24), alleged numerous incidents of sexual misconduct by Dr. Roberts with three different female patients in treatment with him. This complaint was attached to the defense's specific demand for exculpatory evidence. The demand requested specific answers to eleven enumerated questions (68:1-9; App. 103-111). On September 9, 1988, Assistant District Attorney Burr responded by letter to the defense demand for exculpatory evidence. The prosecutor's response strenuously denied that any of the information sought could be characterized as exculpatory evidence, but did provide answers to the eleven questions posed by the defense (69:1-3; App. 112-114).

On September 12, 1988, the prosecution filed with the Circuit Court a motion *in limine* requesting that the trial court:

> . . . prohibit any inquiry by the defense of Dr. Leigh Roberts concerning any allegations made against Dr. Roberts by the State of Wisconsin Medical Examining Board, and more fully described in the Medical Examining Board complaint appended to the defense motion requesting "exculpatory evidence." The state further

> requests that the court order that there by [sic] no inquiry whatsoever concerning any ramification of those pending allegations, including, but not limited to, the status of Dr. Roberts' hospital privilege at University Hospitals.

(71:1; App. 115).

In arguing against the motion *in limine*, the defense noted that the circumstances raised serious questions relating to the bias, motive and interest of Dr. Roberts, who faced serious allegations of sexual misconduct with criminal implications, which Dr. Roberts knew could be decided and prosecuted by the Dane County District Attorney's office. Dr. Roberts continued his involvement with the Lindh case, and continued the process of arriving at his diagnosis. At the same time he was aware that the Dane County District Attorney, who had retained him in this case, would potentially be in a position to charge and prosecute him for sexual misconduct with patients (115:37-38). The defense also argued that aside from Dr. Roberts' bias, motive and interest, that he should be permitted to explore the ramifications of the pending allegations based on the serious ethical improprieties which had been alleged against Dr. Roberts by three separate women. The defense noted that if this trial were to follow the practice in prior prosecutions, while Dr. Roberts was being qualified as an expert, he would be presented to the jury as a professional of great integrity, impartiality, and ethics. Counsel noted that, in the past, Dr. Roberts had even informed juries that he was a deacon in his church (115:39). Defense counsel noted that University Hospitals had suspended Dr. Roberts' privilege to treat patients at that institution after conducting

their own investigation. He argued that he should be permitted, during his own questioning on Dr. Roberts' qualifications, to note this suspension so that the state would not be able to present Dr. Roberts as though he were "as pure as the driven snow" (115:40).

After repeatedly noting the Dane County District Attorney's "very careful handling" of a potentially difficult problem (115:47-48), the trial court ruled that evidence relating to the investigation of Dr. Roberts' misconduct was "totally irrelevant and immaterial" and granted the state's motion *in limine* (115:49). Defense counsel then queried the court to determine whether the scope of the trial court's ruling was a broad as the language in the state's motion:

> [DEFENSE COUNSEL]: Judge, does the court's opinion mean, literally, that there can't be any cross-examination of Dr. Roberts on any aspect, any ramifications of these allegations?
>
> THE COURT: That's correct.
>
> [DEFENSE COUNSEL]: The suspension at University Hospitals can't be delved into, in any [degree], in his credentials, in any voir dire examination?
>
> It's as if – am I correct in saying that what the court has ruled is its as if this allegation had never been made? All the potential ramifications arising from it are clearly off limits? And I can't – simply can't explore any aspect of this through a voir dire of Dr. Roberts on the stand?
>
> Judge, what I would be asking the court to do is to give me the right, outside the presence of the jury, to voir dire Dr. Roberts in more detail as to his knowledge of this matter, to explore in a little bit more detail possible biased interest and motive he had.
>
> THE COURT: So it's clear, the motion I granted is as asked. I was moved – this court was moved to prohibit any inquiry by the defense of Dr. Leigh Roberts concerning any allegations made against Dr. Roberts by the State of Wisconsin Medical Examining board, and more fully described in the Medical Examining Board complaint appended to the defense motion requiring exculpatory evidence.
>
> The state further requested – and I do grant, and this court does order – that there be no inquiry whatsoever concerning any ramifications of these pending investigations, including, but not limited to, the status of Dr. Roberts' hospital privileges at University Hospitals.
>
> I will, however, take under advisement your separate request for inquiry outside the presence of the jury, and I will want to think about that[3].
>
> But, at the moment, it's a blanket granting of the motion *in limine*.
>
> (115:50-51)

[3] Later, the trial court did permit live voir dire of Dr. Roberts outside the presence of the jury on the subject of the state's Motion *In Limine*. This voir dire disclosed no material variance between Dr. Roberts own responses and Prosecutor Burr's written answers to the defense's Specific Demand for Exculpatory Evidence, therefore, the trial court reaffirmed its ruling on the state' [sic] Motion In Limine (123:121-127; App. 117-122).

The principal witness for the defense at the mental responsibility phase of the trial was Dr. Ezra Griffith, an associate professor of psychiatry at the Yale University School of Medicine, who like the psychiatrists called by the state, was board certified in general psychiatry and also within the sub-specialty of forensic psychiatry (124:7-9). After explaining the basis for his diagnosis, Dr. Griffith testified to a reasonable degree of medical certainty that on January 15, 1988, Aaron Lindh was in a psychotic state which he diagnosed as "brief reactive psychosis"; that a result of that psychotic state Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct; and that as a result of that psychotic state Lindh lacked substantial capacity to conform his conduct to the requirements of law (124:72-74). Dr. Griffith also testified to a reasonable degree of medical certainty that Lindh had been suffering from mental diseases or disorders long before January 15, 1988. He characterized these long-term disorders as a "mixed personality disorder." He explained that by "mixed personality disorder" he meant that he had concluded to a reasonable degree of medical certainty that Aaron Lindh's long-term mental illness or disorder fit into two diagnostic categories: "borderline personality disorder" and "narcissistic personality disorder." These diagnoses were made to a reasonable degree of medical certainty (124:49-57). Dr. Griffith explained to the jury the relationship between his conclusion that Lindh had been afflicted with this mixed personality disorder long before the date of the crime, and his diagnosis and conclusion that on January 15, 1988, Lindh was in a psychotic state which denied him a substantial capacity to appreciate the

wrongfulness of his conduct, and to conform his conduct to the requirements of the law (125:78-81). Dr. Griffith also expressed his opinion that Aaron Lindh did not meet the criteria for "anti-social personality disorder" as outlined in DSM-III-R[4] (124:82-84).

The principal expert witness for the state was Dr. Leigh Roberts. while he was qualified, Dr. Roberts stressed his good character, high ethical standards and religious nature by noting that he was a grandfather with "eight grandchildren up to nearly the age of Mr. Lindh" (125:8); that not only was he a faculty member at the University of Wisconsin Medical School, but that he was also "on the adjunct faculty of the San Francisco Theological Seminary" (125:13); that he had chaired conferences "in relation to religion and mental health" (125:15); and that about three years prior to his testimony he had been "honored . . . as essentially the mid-west psychiatrist of the year" (125:16). Dr. Roberts disagreed with each and every professional opinion of Dr. Griffith. Dr. Roberts expressed his expert opinion that Aaron Lindh did not suffer from "borderline personality disorder" (125:72). He expressed an opinion that Lindh did not exhibit the traits of a "narcissistic personality disorder" (125:74-75). He expressed his opinion to a reasonable degree of medical certainty that Lindh could be characterized only as an "anti-social personality disorder"; and that Lindh was not

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[4] The third revised edition of the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS frequently referred to during the trial by expert witnesses for both sides (124:47-48; 125:69, 76, 81).

suffering from a mental disease on January 15, 1988, at the time he committed the offenses (125:76).

Dr. Roberts claimed advantage over the other expert witnesses[5] in diagnosing Lindh's mental state on January 15, 1988, because only he had interviewed Lindh within hours of the crime:

> Q. In evaluating Mr. Lindh in the case materials regarding him, in your efforts to formulate your opinions, how important was it to you as a psychiatrist to see him on January 15, 1988, the day of the shooting?
>
> A. It's very important. It's not always essential. It is possible to reconstruct what happened. It's possible a person has memory of that period of time, and as there is other information about an individual, other persons who saw them and described them during that time, it's possible to do that reconstruction and to do it in a very accurate and knowledgeable kind of way.
>
> However, it is very helpful to have had the first hand experience and to be able to do a professional evaluation that close in time to the actual event and to see what he looked like in that immediate period, that particular day within

---

[5] Dr. Fosdal, the state's other expert witness, did not see Lindh until April 15, 1988, three months after the shooting (125:140). In cross-examining Dr. Griffith, the defense expert, the prosecutor took care to point out that he had not interviewed Lindh until July, six months after the shooting:

> Q And it's a fact, sir, that you did not see Mr. Lindh until July 9th, 10th, and 11th?
>
> A That's correct.

(124:89)

> just a few hours of the time that their behavior occurred.
>
> It would be even more helpful to have seen him 30 minutes later, but a few hours later does give one a much better professional indication. One has to, when they don't have that opportunity, to then rely upon the report of the individual, a report of their experience, and the report of other persons who have seen them at that time, what they look like, how they appear to feel, what they're saying, what they're doing to place a lot of reliance on the behavior of a person, so very helpful but not absolutely essential.

(125:85-86).

The state also called Dr. Frederick Fosdal as an expert witness. Dr. Fosdal testified that he had talked to Aaron Lindh on two occasions for three hours each time (125:140). In examining Dr. Fosdal, the district attorney did not ask about those interviews in the same detail as had been asked of Dr. Roberts, nor was other information providing the basis for Dr. Fosdal's diagnosis elicited in the same detail given by Dr. Roberts. Instead the prosecutor elected to shorten Dr. Fosdal's presentation by relying upon the fact that this witness was present in court when Drs. Griffith and Roberts had testified (125:141) Dr. Fosdal testified that he "would assume" that he had the same materials available to him as did the other doctors who had diagnosed Lindh (125:141). Without describing the substance of his interviews of Lindh, Dr. Fosdal testified that the information he had obtained from those interviews was "for all intents and purposes identical to what Drs. Griffith and Roberts [had] testified to" and "similar

in format and [sic] that had already been testified to." (125:141-142)

On that basis, Dr. Fosdal expressed his opinion that Lindh was not suffering from a "brief reactive psychosis" on the day of the crime (125:156-157), and that Lindh did not have a mental disease at that time (125:163), but unlike Dr. Roberts, he agreed with Dr. Griffith that Aaron Lindh fit the category of "mixed personality disorder" (125:166). He conceded to the defense that in the "mixed personality disorder" which he himself had diagnosed, Lindh "might have" the traits of both "narcissistic personality disorder" and "borderline personality disorder" which had been found by Dr. Griffith (125:166-167).

After deliberation, the jury found that Aaron Lindh was not suffering from a mental disease at the time of the murders in the City-County Building on January 15, 1988 (126:81). Further facts will be stated as necessary in the argument, which follows.

* * *

STATE OF WISCONSIN	CIRCUIT COURT BRANCH V	DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

AARON J. LINDH,

Defendant.

SPECIFIC DEMAND FOR EXCULPATORY EVIDENCE

Case No. 88-CF-60

Now comes the Defendant, AARON J. LINDH, by his attorneys, ROBERT P. BURKE and ANN DAVEY, and respectfully makes the following specific demand for exculpatory evidence on the grounds that such evidence goes to the credibility of state witness Dr. Leigh Roberts and may form the foundation for impeachment on the grounds of bias or motive and further such evidence may be relevant on the general qualifications of the witness as an expert psychiatric witness. Attached is a copy of the notice and complaint which was filed against Dr. Roberts.

1. When was Dr. Roberts first aware that any of the allegations had been made?

2. When was he first aware that the allegations could result in criminal charges against him?

3. When were any of the allegations first referred to the Dane County District Attorney's Office, either formally or informally?

4. When was Dr. Roberts first aware that any of the allegations had been referred to the Dane County District Attorney's Office.

5. Was Dr. Roberts ever contacted by either the Dane County District Attorney's Office or any police officer concerning these allegations? If so, when and what was discussed?

6. How long did the allegations remain pending in the Dane County District Attorney's Office before being referred to a special prosecutor?

7. When was the special prosecutor appointed?

8. Was Dr. Roberts aware of this appointment? If so, how was he notified and when?

9. Has any member of the Dane county District Attorney's Office been in contact with an attorney representing Dr. Roberts concerning these allegations? If so, when were these contacts made and what was the substance of the conversation?

10. Had the Dane County District Attorney's Office made any formal or informal decision as to whether criminal charges should be filed against Dr. Roberts prior to the appointment of the special prosecutor? If so, was Dr. Roberts or his representative made aware of this decision?

11. Is the Dane County District Attorney's Office aware of any additional allegations of misconduct against Dr. Roberts in his professional capacity which are not set forth in the attached complaint? If so, what are these allegations?

Dated this 7th day of September, 1988.

RESPECTFULLY SUBMITTED:

/s/ Robert P. Burke
ROBERT P. BURKE
Assistant State Public Defender

/s/ Ann Davey
ANN DAVEY
Assistant State Public Defender

Attorneys for Defendant

STATE PUBLIC DEFENDER OFFICE
131 West Wilson Street, 7th Floor
Madison, Wisconsin 53703
(608) 266-9158
(608) 267-9646

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	COMPLAINT LS8808291MED
LEIGH M. ROBERTS, M.D., RESPONDENT	:	

Pamela E. Ellefson, an investigator with the Wisconsin Department of Regulation and Licensing, Division of Enforcement, 1400 E. Washington Avenue, Madison, Wisconsin 53702, upon information and belief, complains and alleges as follows:

COUNT I

1. Leigh M. Roberts, M.D., Respondent herein, is duly licensed and registered to practice medicine and surgery in the state of Wisconsin pursuant to license number 0011745, which was granted January 21, 194. That Respondent's last address reported to the Department of Regulation and Licensing, as required by section 440.11, Wis. Stats., is 600 Highland Avenue, Madison, Wisconsin 53792.

2. That Respondent specializes in the area of psychiatry, and so specialized at all times relevant to this complaint.

3. That in April of 1981 Patient 1 was referred by her pastoral counselor to Respondent for psychiatric evaluation and possible therapy. That Respondent first saw Patient 1, in Respondent's professional capacity, on 4/22/81.

4. When Respondent saw Patient 1 on 4/22/81, he diagnosed her as suffering from a bi-polar affective disorder and prescribed Lithium for that disorder. Respondent also noted that Patient 1 had a mixed personality disorder.

5. Patient 1 saw Respondent, in his professional capacity, in his office through January, 1983 and again on September 30, 1983.

6. That in May of 1982, Respondent gave Patient 1 a hug at the conclusion of a Saturday therapy session. At the next appointment, Patient 1 gave Respondent a hug and Respondent pressed Patient 1 close, leaned toward her to kiss her on her mouth, and when she indicated by her posture she did not want a kiss he kissed her on her neck.

7. That from the time of the hugs in May of 1982 through January of 1983 the hugging continued in a similar manner. On one occasion Respondent hugged Patient 1 very tightly, moved her back and forth across his chest in a sensual manner, grasped her by her buttocks and pulled her forward against Respondent's groin.

8. That following an appointment on January 25, 1983, Patient 1 did not see Respondent again until an appointment of September 30, 1983. A few days previous to September 30, 1983, Patient 1 telephoned Respondent

concerning her Lithium blood levels. Respondent ordered a Lithium blood test done at the hospital where he practices and Patient 1 had the test done.

9. That Patient 1 met with Respondent, at his office, on September 30, 1983 to discuss the results of the blood test, among other things. At that appointment, Respondent kissed and hugged Patient 1 and touched her breasts through her clothing.

10. That following the 9/30/83 session, Patient 1 continued to meet with Respondent at his office on regular occasions through February of 1984. On those occasions they engaged in sexual contact, including sexual intercourse.

11. In February of 1984, Patient 1 advised Respondent that she could not continue with their relationship and she stopped seeing him for all purposes. In May of 1984, Respondent called Patient 1 concerning a mutual acquaintance and also told Patient 1 that he wanted to see her. Patient 1 met with Respondent at his office on June 5, 21, 26, and September 8, 1984. Respondent and Patient 1 engaged in sexual contact on all four occasions, and sexual intercourse on the first three occasions. Respondent and Patient 1 also met at Respondent's office on March 25, 1986 and had sexual intercourse. Patient 1 returned to Respondent's office on April 15, 1986 at which time there was romantic kissing but no other sexual contact.

12. That it is below the level of minimal competence for a psychiatrist to enter into a sexual relationship with a patient, who is in therapy with that psychiatrist, and to continue such a sexual relationship.

13. That a psychiatrist who enters into a sexual relationship with a patient, who is in therapy with their psychiatrist, exposes that patient to risks of harm to which a minimally competent psychiatrist would not expose a patient.

14. That Respondent be engaging in the conduct set out in this Count of this Complaint has engaged in conduct which tends to constitute a danger to the health, welfare or safety of Patient 1, which constitutes unprofessional conduct as defined by section 448.02(3), Wis. Stats., and Wis. Adm. Code section Med 10.02(2)(h).

COUNT II

15. Realleges paragraphs 1 and 2 of this complaint.

16. That Respondent first saw Patient 2, in Respondent's professional capacity, on September 4, 1981 and continued to treat her in his professional capacity through February 4, 1983.

17. That Respondent initially saw Patient 2 for headaches and depression. That at the time therapy with Respondent ceased in February of 1983, Respondent diagnosed Patient 2 as suffering from a bipolar disorder with depression and headaches, with a prominent extracranial vascular component.

18. That during that period of therapy Respondent provided Patient 2 with psychotherapy and medication. Respondent saw Patient 2 on a regular basis.

19. That during the period of therapy Patient 2 told Respondent that she had been sexually abused between the ages of six and eights. [sic]

20. That at the February 4, 1983 Saturday session in Respondent's office Respondent produced some lotion and advised Patient 2 that Respondent wanted to rub Patient 2's back, an act which would have required Patient 2 to remove her top. That Patient 2 declined to allow Respondent to give her a back rub. That during the session Respondent put his arms around Patient 2, kissed Patient 2 with an open-mouth kiss, touched her sexually without her permission, and told her that he wanted to make love to her.

21. That Patient 2 immediately left Respondent's office and never returned.

22. That it is below the level of minimal competence for a psychiatrist to attempt to enter into a sexual relationship with a patient, who is in therapy with that psychiatrist.

23. That a psychiatrist who attempts to enter into a sexual relationship, with a patient who is in therapy with that psychiatrist, exposes that patient to risks of harm to which a minimally competent psychiatrist would not expose a patient.

24. That Respondent by engaging in the conduct set out in this Count of this Complaint has engaged in conduct which tends to constitute a danger to the health, welfare or safety of Patient 2, which constitutes unprofessional conduct as defined by section 448.02(3), Wis. Stats., and Wis. Adm. Code section Med 10.02(2)(h).

COUNT III

25. Realleges paragraphs 1 and 2 of this Complaint.

26. That Patient 3 saw Respondent in Respondent's professional capacity from June 20, 1983 through February, 1988. That Patient 3 first went to Respondent because of depression.

27. That Respondent diagnosed Patient 3 as suffering from a bipolar affective disorder and treated her with psychotherapy and medications.

28. After Patient 3 had been seeing Respondent for therapy for a few months, Patient 3 asked if she could hug Respondent, which he allowed. Over several sessions, the hugs escalated to kisses, Respondent touching Patient 3's breasts, and then sexual intercourse.

29. Patient 3 and Respondent continued to have sexual intercourse and other sexual contact at therapy sessions held at Respondent's office through November of 1987.

30. That on two occasions prior to November, 1987 Respondent went to Patient 3's home to provide her with psychotherapy and had sexual contact and sexual intercourse with Patient 3.

31. Respondent and Patient 3 continued to have sexual contact, but not sexual intercourse at Respondent's office through the last session, which was held in February of 1988.

32. That Patient 3 came to the realization that what was occurring with Respondent was improper, and she terminated therapy with Respondent in February, 1988.

33. That it is below the level of minimal competence for a psychiatrist to enter into a sexual relationship with a patient, who is in therapy with that psychiatrist, and to continue such a sexual relationship.

34. That a psychiatrist who enters into a sexual relationship with a patient, who is in therapy with that psychiatrist, exposes that patient to risks of harm to which a minimally competent psychiatrist would not expose a patient.

35. That Respondent by engaging in the conduct set out in this Count of this complaint has engaged in conduct which tends to constitute a danger to the health, welfare or safety of Patient 3, which constitutes unprofessional conduct as defined by section 448.02(3), Wis. Stats., and Wis. Adm. Code section Med 10.02(2)(h).

Wherefore, the Complainant demands that the Board hear evidence relevant to matters recited herein, determine, and impose the discipline warranted. Complainant further demands that the Board assess against the Respondent all costs of the proceeding and order them paid to the Department of Regulation and Licensing, pursuant to sec. 440.22, Wis. Stats.

/s/ Pamela E. Ellefson
Pamela E. Ellefson,
Investigator

STATE OF WISCONSIN)
)
COUNTY OF DANE)

Pamela E. Ellefson, being first duly sworn on oath deposes and says that she is an investigator for the State

of Wisconsin, Department of Regulation and Licensing, Division of Enforcement, and that she has read the foregoing Complaint and knows the contents thereof and that the same is true to her own knowledge, except as to those matters therein stated on the information and belief and as to such matters, she believes them to be true.

/s/ Pamela E. Ellefson
Pamela E. Ellefson
State of Wisconsin
Department of Regulation
& Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Subscribed and sworn to before me
this 25th day of August, 1988.

/s/ John B. Zwieg
John B. Zwieg, Notary Public
My Commission is permanent

John R. Zwieg
Attorney for Complainant
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
(608) 266-9932

JRZ:gad
DOEATTY-293

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	NOTICE OF HEARING
LEIGH M. ROBERTS, M.D.,	:	LS8808291MED
RESPONDENT.	:	

TO: Leigh Roberts, M.D.
B6 240
Clinical Science Center
600 Highland Avenue
Madison, WI 53792

Please take notice that a hearing constituting a class 2 proceeding as defined in sec. 227.01(3)(b), Wis. Stats., will be held on the 28th, 29th and 30th days of November, and 1st and 2nd days of December, 1988 at 9:30 a.m. or as soon thereafter as the matter may be reached, in Room 133, 1400 East Washington Avenue, Madison, Wisconsin, on the questions of whether the license heretofore, issued to the above-named respondent pursuant to section 448.02, Wis. Stats., should be suspended or revoked, the above-named respondent should be reprimanded or whether such license should be limited.

The legal authority and jurisdiction under which the hearing is to be held is set forth in section 448.02(3), Wis. Stats., and Chapter RL 2, and Chapter MED 12, Wis. Adm. Code.

The matters asserted and the charges then and there to be considered are as set forth in the attached complaint to which you are required, pursuant to sec. RL 2.09, Wis. Adm. Code, to make answer in writing within twenty (20) days from the date of service of the complaint. The hearing examiner designated to preside over the matter pursuant to sec. 227.46, Wis. Stats. and sec. RL 2.10, Wis. Adm. Code, is James E. Polewski, Department of Regulation and Licensing, Office of Hearing Examiner, P.O. Box 8935, Madison, Wisconsin 53708-8935. You shall file your answer with the examiner at the address indicated, a copy of said answer with the Board and a copy with complainant's attorney, John R. Zwieg, Department of Regulation and Licensing, Division of Enforcement, P.O. Box 8935, Madison, Wisconsin 53708-8935 (608) 266-9932. If you fail to file an answer within such time, a default judgment may be entered, and your license revoked, suspended, or other disciplinary action taken upon proof of such default. If you fail to appear at the time set for hearing, a default judgment may be entered, and your license revoked, suspended, or other disciplinary action taken upon such default.

If you are represented by counsel, the counsel is requested to file a notice of appearance with the Board forthwith.

Dated at Madison, Wisconsin this 26th day of August, 1988.

/s/ John R. Zwieg
John R. Zwieg, Attorney
Division of Enforcement

JRZ:skv
TENDAY-1263

[SEAL]

DANE COUNTY
DISTRICT ATTORNEY'S OFFICE

HAL HARLOWE
DISTRICT ATTORNEY

(Letterhead Omitted In Printing)

September 9, 1988

Attorney Robert Burke
State Public Defender's Office
131 West Wilson Street, 7th Floor
P.O. Box 7862
Madison, Wisconsin 53707

Re: *State of Wisconsin vs. Aaron J. Lindh*
Case No. 88 CF 60

Dear Mr. Burke:

Please find enclosed a final copy of an autopsy protocol prepared by Dr. Huntington concerning his autopsy of Eleanor Townsend. We just received the final copy yesterday. You earlier received a rough copy of that autopsy.

I spoke with Dr. Leigh Roberts today. You have already received the notes of his initial interview with Lindh. I should be able to get into personal contact with Dr. Roberts over the weekend and get copies of notes of his other interviews with your client. We will get those to you on Monday.

On September 7, 1988, you filed a motion entitled "Specific Demand for Exculpatory Evidence." The information sought in the eleven questions in that "Specific Demand" is not and has never been, in our view, exculpatory evidence. We unequivocally believe that under no interpretation is this evidence exculpatory.

Nonetheless, since you have requested information concerning this case and in the past, when possible, we have always provided it, I have the following response.

1. Dr. Roberts became aware of an allegation made to University Hospitals on March 8, 1988.

2. On March 8, 1988.

3. On Thursday, June 23, 1988, at approximately 12:30 p.m., District Attorney Hal Harlowe met with counsel for University Hospitals. A request for this meeting was made by hospital attorneys on the morning of June 23, 1988.

4. Dr. Roberts first became aware that allegations had been referred to the Dane County District Attorney's Office between July 6 and July 8, 1988.

5. Dr. Roberts was never contacted by any member or representative of the Dane County District Attorney's Office nor was he contacted by any police officer concerning these allegations.

6. In the meeting of June 23, 1988, District Attorney Harlowe advised attorneys from the hospital that because our office had worked closely with Dr. Roberts on a number of past and pending cases that in his view a conflict of interest existed and we were ethically required to request appointment of special counsel to investigate the allegations and take whatever further action might be appropriate. On June 23 and 24, 1988, District Attorney Harlowe

attempted, without success, to reach Milwaukee County District Attorney Michael McCann to determine if he would accept appointment as special counsel. Several phone messages were exchanged and District Attorney Harlowe finally spoke with District Attorney McCann on June 27, 1988. District Attorney McCann advised District Attorney Harlowe that they had no conflict of interest and would accept the appointment.

7. On June 28, 1988, District Attorney Harlowe submitted the attached motion to Chief Judge Angela Bartell who signed the order appointing E. Michael McCann special prosecutor. On June 29, 1988, a copy of this order was mailed to District Attorney McCann. No one from the Dane County District Attorney's Office has had contact with the case or discussed it with District Attorney McCann's office since.

8. Dr. Roberts was aware of the appointment of a special prosecutor between July 6 and July 8, 1988. He was notified of this appointment by his attorney, John D. Hanson.

9. To my knowledge I am the only member of the Dane County District Attorney's Office who has had contact with Dr. Roberts' attorney, John D. Hanson. I phoned him on the morning that the article concerning Dr. Roberts appeared in the "Wisconsin State Journal" and only inquired as to how Dr. Roberts was doing.

Subsequently, on September 7, 1988, over the noon hour, Mr. Hanson called me to inform me that he had been contacted by you or one of your representatives on the previous day. I then asked him the questions posed in your demand and received some responses.

10. No formal or informal decision was made by the Dane County District Attorney's Office as to whether criminal charges should be filed against Dr. Roberts prior to the appointment of a special prosecutor. I am unaware as to whether this lack of any decision was communicated to Dr. Roberts or his attorney.

The Dane County District Attorney's Office is not aware of any additional allegations of misconduct against Dr. Roberts in his professional capacity.

Insofar as I am able, I have responded to your request for information.

Sincerely,

/s/ John R. Burr
John R. Burr
Assistant District Attorney

JRB:djd

cc: Judge Robert R. Pekowsky

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 5	DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

AARON J. LINDH,

Defendant(s).

MOTION IN LIMINE

Case No. 88 CF 60

NOW COMES the State of Wisconsin, by Assistant District Attorneys John Burr and Jac Heitz, hereby moves the Court to prohibit any inquiry by the defense of Dr. Leigh Roberts concerning any allegations made against Dr. Roberts by the State of Wisconsin Medical Examining Board and more fully described in the Medical Examining Board complaint appended to defense motion requesting "exculpatory evidence." The State further request that the Court order that there be no inquiry whatsoever concerning any ramification of those pending allegations, including but not limited to the status of Dr. Roberts' hospital privilege at University Hospitals.

Said inquiry would be totally irrelevant to the proceedings in the above-captioned case and not admissibile [sic] under any section of Chapter 904 of the Wisconsin Statutes nor admissible under Chapter 906 or Chapter 907, Wis. Stats. In short, the State of Wisconsin believes that any such inquiry be totally irrelevant and immaterial to the issues presented to the Court.

Dated at Madison, Wisconsin, this 12 day of September, 1988.

Respectfully submitted:

/s/ John R. Burr
John Burr
Assistant District Attorney
Dane County, Wisconsin

/s/ Jac Heitz
Jac Heitz
Assistant District Attorney
Dane County, Wisconsin

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[117] LEIGH ROBERTS

called as a witness, having been first duly sworn, was examined and testified as follows:

VOIR DIRE EXAMINATION BY MR. BURKE:

Q Sir, your name is Dr. Roberts?

A That's correct.

Q Okay. Doctor, your first involvement in this case was January 15th, the evening of January 15th of 1988?

A I had a phone contact in the late afternoon. My first contact with Mr. Lindh was that evening.

Q Doctor, when you began your involvement in this case on January 15th, at that point were you aware of any allegations of misconduct that were going to be lodged against you or threatened to be lodged against you at that time?

A No, I was not.

Q At some point you were aware there was a hospital investigation concerning the allegations of misconduct?

A Yes.

Q When were you first aware of the hospital investigation?

A March 8th of this year.

Q Doctor, how did you become aware of that hospital investigation?

[118] A I was informed by the hospital's attorney.

Q Were you aware at that point – I'm not asking for the details, but were you aware of what type of allegation of misconduct it was?

A Yes.

Q At that point, was it – were you aware of more than one individual who was making the allegation?

A No.

Q Just the one?

A Yes.

Q Were you aware at that point that the allegation against you could have or could be the subject of a criminal prosecution under Wisconsin Statutes?

A Yes, I was aware of the Statute.

Q That was 940.22?

A The number I wouldn't know.

Q But you were aware that at least the allegation against you could have – could be a criminal prosecution subjecting yourself up to a five year prison sentence?

A I was not aware of that detail.

Q Doctor, the complaint that was eventually filed against you in front of the Medical Examining Board concerning the three allegations was March 8th, the first time you were aware of any of these allegations that there was a complaint lodged against you? Is my question unclear?

[119] MR. BURR: I must confess, I'm confused by it.

THE COURT: Do you want that reworded, doctor?

THE WITNESS: It appeared to involve two different matters, and I was – I find it difficult to respond to.

BY MR. BURKE:

Q Okay. Doctor, you're aware of the complaint that has been lodged against you that's now pending in front of the Medical Examining Board?

A Yes.

Q When were you first aware of any of those allegations, that they were either going to be made or there was, in your mind, an awareness that they were going to be made?

A I'm – I'm having difficulty in terms of we appear to be taking about two different – two different matters and I'm having difficulty in the crossing of those two.

Q Doctor, you indicated on March, I believe, 8th that you were aware of the hospital investigation?

A That's correct.

Q Were you aware before March 8th at any point that there were allegations of sexual misconduct that were going to be filed against you before March 8th?

A No.

Q So, even informally or indirectly, you weren't aware that there were some potential allegations that might be coming down against you?

[120] A No.

Q Doctor, when were you first aware of the investigation by the Medical Examining Board?

A I can't give a precise date. It would have been – I believe it was in May.

Q Doctor, do you know how you became aware?

A Yes, a request was made to provide records and there was indication in correspondence that there had been a complaint made.

Q Doctor, apparently there was a meeting involving Mr. Harlowe on June 23rd with some officers from the hospital, I'm assuming concerning allegations against you. Were you aware that there was going to be a meeting?

A The first awareness I had of that was in seeing some correspondence this afternoon.

Q Doctor, when you were first aware of this allegation back on March 8th, would I be correct in saying that you were also aware that the criminal – there was a potential for a criminal charge that could have ended up in the Dane County District Attorney's Office?

A I guess I – I should have had that awareness. I really did not give that thought, as such. I simply knew that there was a statute related to that. I would presume the prosecution of such a statute would be in the same [121] county, so it would, therefore, be in the District Attorney's Office.

Q Doctor, when were you first aware that the matter concerning the allegations, the subject of the Medical Examining investigation, when were you first aware that

those allegations were referred to the District Attorney's Office here in Dane County?

A About about [sic] the 8th of July; it was early July.

Q Do you know how you became aware of that?

A Yes. I was informed of that by a private attorney.

Q Somebody that you retained?

A Yes.

Q When were you first aware that the matter was – there was appointment of a special prosecutor?

A I believe that had been done as of that time.

Q Doctor, have you or an attorney in your behalf ever discussed these allegations, the allegations of sexual misconduct, with anyone in the Dane County District Attorney's Office?

A Well, I have not. I can't – I'm not sure I can speak fully for someone else. To my knowledge, I don't know that he has, but I can't speak for him.

Q You don't know if he did so prior to July 8th when you were first aware of the referral to the Dane County District Attorney's Office?

[122] A I don't know other than his having been informed, you know, the details of that. I don't know.

Q Okay. I have no further questions.

VOIR DIRE EXAMINATION BY MR. BURR:

Q Just so it's clear, doctor, you – as I understand it, you became apprised that the allegations had been

referred to our office on or about July 8th and you learned that through your attorney?

A That's correct.

Q And at the same time you learned that there had been appointment of a special prosecutor?

A Yes.

Q Did these allegations and what you've described here today have any effect whatsoever on your involvement in this case?

A No.

Q No further questions.

THE COURT: Mr. Burke?

MR. BURKE: Nothing further.

THE COURT: Thank you, doctor. I appreciate your being available for this examination. Any reason why the doctor should be detained?

MR. BURR: I need to speak with him briefly on scheduling.

THE COURT: I'll see you tomorrow morning.

* * *

IN THE UNTIED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, Warden,

Respondent.

Case No. 92-C-0690

(Filed Sep. 11, 1992)

MOTION TO REQUIRE STATE TO FILE TRANSCRIPTS AND REQUEST FOR BRIEFING SCHEDULE

Petitioner, by undersigned counsel, moves pursuant to Rule 5 of the Federal Rules governing cases in the United States District Courts under sec. 2254 of Title 28, U.S. Code, for an order requiring the state to file with the court copies of the transcripts of the relevant state trial court proceedings in this matter. Petitioner also asks that the court establish a briefing schedule in this case. In support of this motion, petitioner states the following:

1. The respondent answers the petition for writ of habeas corpus by denying that petitioner's constitutional right to confront the state's witnesses was violated when the trial court restricted his cross-examination of the state's key psychiatric witness at the mental responsibility phase of his trial. The respondent also alleges that if petitioner's constitutional rights were violated, the error was harmless. Resolution of these issues will require the court to consider the transcripts of the trial proceedings. For this reason, petitioner believes that the

respondent should file with the court at least the transcripts of the hearing on motions on May 23, 1988, and the trial proceedings on September 13, 1988, September 14, 1988, September 15, 1988, September 16, 1988, September 17, 1988, September 19, 1988, September 20, 1988, September 21, 1988, September 22, 1988, September 23, 1988, and September 24, 1988.

2. Respondent also alleges for the first time in this case that petitioner's constitutional rights were not violated because the constitutional right to confront one's accusers does not apply at the mental responsibility/ insanity phase of a bifurcated proceeding in Wisconsin. Petitioner concedes that if the court rules solely on this issue, review of the transcripts may not be necessary. Petitioner denies, however, that the confrontation clause is inapplicable at the second phase of a bifurcated proceeding. Petitioner assumes that briefing on that issue would best be presented in conjunction with briefing on the substantive issue of whether petitioner's confrontation clause rights were violated under the circumstances of this case. Therefore, petitioner believes that submission of the transcripts at this time is necessary.

WHEREFORE, petitioner requests that the court direct the respondent to submit the transcripts from the trial court proceedings in this matter on May 23, 1988, September 13, 1988, September 14, 1988, September 15, 1988, September 16, 1988, September 17, 1988, September 19, 1988, September 20, 1988, September 21, 1988, September 22, 1988, September 23, 1988, and September 24, 1988, and that the court establish a briefing schedule.

Dated the 10th day of September, 1992.

Respectfully submitted,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State Public Defender
Post Office Box 7862
Madison, Wisconsin 53707
(608) 267-5176

Attorney for Petitioner.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, Warden,

Respondent.

Case No. 92-C-0690

(Filed Sep. 16, 1992)

RESPONSE TO MOTION TO COMPEL STATE TO FILE TRANSCRIPTS

Respondent, by his undersigned attorneys, hereby opposes the motion requesting the court to compel the state to file transcripts in this case, for the following reasons:

1. Petitioner concedes that if respondent is correct that he has no federal constitutional right to confrontation at the insanity phase of trial, his claim is not cognizable on federal habeas and that transcripts of the trial and pretrial proceedings would not be necessary. In order to avoid the unnecessary time and expense of copying voluminous transcripts, respondent suggests that this court should accept briefs on this issue first, since it might be dispositive.

2. In the alternative, if transcripts are ordered, respondent suggests that petitioner should be required to

file a copy of the relevant transcripts with the court. Although the rules appear to contemplate that respondent ordinarily is responsible for filing the transcripts, that rule is evidently premised on the assumption that a habeas petitioner is pro se and has no access to the transcripts. Here, however, petitioner is represented by counsel, the same counsel who was appointed by the state public defender's office to represent him in the state courts. Pursuant to state statute, petitioner was entitled to and presumably received a complete copy of the relevant transcripts, at state expense, when he initiated his state appeal. Respondent believes it is unduly burdensome to require respondent to supply the transcripts in this situation, where petitioner has at least as much access and ability to provide them as respondent. The practice in habeas cases to require the respondent to provide the transcripts is contrary to the ordinary practice where the moving party is responsible for presenting the record to the court. This unique procedure should be reserved for only those cases where it is necessary – i.e., in pro se cases where the petitioner has no access to the information.

Dated this 15th day of September, 1992.

JAMES E. DOYLE
Attorney General

/s/ Sally L. Wellman
SALLY L. WELLMAN
Assistant Attorney General

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1677

(SEAL)

THE STATE OF WISCONSIN
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State Public Defender
Nicholas L. Chiarkas

Chief, Trial Division
Ellen K. Berz

Deputy State Public Defender
Eileen A. Hirsch

Chief, Appellate Division
Kenneth P. Casey

September 22, 1992

The Honorable John W. Reynolds
Senior Judge, United States District Court
Eastern District of Wisconsin
Federal Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Aaron Lindh v. James P. Murphy
Case No. 92-C-0690

Dear Judge Reynolds:

The respondent has answered my motion to compel production of the transcripts in this habeas corpus case by arguing that the transcripts are unnecessary if the court will first address the question of whether the confrontation clause applies at the insanity phase of a bifurcated trial in Wisconsin, and by arguing that if the transcripts are required, that the petitioner, rather than respondent, should be compelled to submit them.

I have no strong objection to the court separating the issues and addressing first the question of whether the confrontation clause applies at the insanity phase of the bifurcated proceeding. If, however, the court should decide to proceed in that manner, it seems to me that it might be appropriate for the court to set a briefing schedule under which the respondent must file his brief first. I suggest this because the issue the respondent wishes to have briefed is one that the respondent raises for the first time in these proceedings. At no time during the state court proceedings did the state argue that the confrontation clause is inapplicable at the insanity/mental responsibility phase. Because the issue is being raised for the first time now, I do not have a good sense for what the state's argument on this point is. Without seeing the state's argument first, it will be difficult for me to construct a legal argument responding to the new contention.

I also want to respond to the state's request that when transcripts are ordered, the court order that petitioner, rather than respondent, submit them. Respondent asks this court to order that which the governing rules do not permit. Rule 5 of the Rules Governing Proceedings in 18 U.S.C. sec. 2254 cases explicitly requires the respondent, not the petitioner, to provide the transcripts. The advisory committee note to the rules confirms that it is respondent's obligation to provide the transcripts. Respondent provides no authority for his proposition that this rule can be ignored or that this rule only applies in cases where the petitioner proceeds pro se.

If the court would like to discuss these issues, I am certainly amenable to a telephone conference call to work

out the procedures that will be followed in this case. Thank you for your consideration of these matters.

Very truly yours,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

cc: Ms. Sally L. Wellman
Assistant Attorney General
123 West Washington Avenue
Post Office Box 7857
Madison, WI 53707

cc: Mr. Sofron Nedilsky
Clerk, U.S. District Court
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, WI 53202

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner-Appellant,

v.

JAMES P. MURPHY,

Respondent-Appellee.

District Court Case No. 92-C-690
Court of Appeals No. 95-3608

MOTION TO SUPPLEMENT THE RECORD

Pursuant to Fed. R. App. P. 10(e) and Seventh Circuit Rule 10(b), and the attached stipulation of the parties, the petitioner-appellant Aaron Lindh moves the court to issue an order directing that a supplemental record be certified and transmitted to the United States Court of Appeals for the Seventh Circuit, containing the documents specified in the attached stipulation, copies of which are also attached to the stipulation. Each of these documents was issued by or submitted to the court as a part of the record and proceedings in the district court in this case. None of these documents was included in the original record transmitted to the court of appeals in this appeal; each is still present in the district court's file (the copies of the letters were made from the originals found in the court's file).

The court of appeals has now ordered that this case be heard en banc and has directed the parties to submit supplemental briefs by May 31, 1996, on a new issue: the applicability and effect of § 104 of the Antiterrorism and

Effective Death Penalty Act of 1996, Pub. L. 104-132. Petitioner-Appellant Aaron Lindh submits that each of these documents has now become material to his briefing and argument on this new issue and that the documents are properly made a part of the record on appeal.

Dated this 16th day of May, 1996.

Respectfully submitted,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State Public Defender

Office of the State Public Defender
Post Office Box 7862
Madison, Wisconsin 53707
(608) 267-5176

Attorney for Petitioner-Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner-Appellant,

v.

JAMES P. MURPHY,

Respondent-Appellee.

District Court Case
No. 92-C-690
Court of Appeals
No. 95-3608

STIPULATION TO SUPPLEMENT THE RECORD

Pursuant to Fed. R. App. P. 10(e) and Seventh Circuit Rule 10(b), the parties to this action hereby stipulate that the following documents, copies of which are attached hereto, were issued by or submitted to the district court as a part of the record and proceedings in the district court in this case, and are properly made a part of the record on appeal and shall be included in a supplemental record submitted to the court of appeals:

- The DECISION AND ORDER entered July 24, 1992, by the Honorable John W. Reynolds, granting the petitioner's petition to proceed in forma pauperis, and ordering that the respondent respond to the petition for a writ of habeas corpus within 30 days.

- The letter dated September 22, 1992, from Keith A. Findley to the Honorable John W. Reynolds.

- The letter dated January 22, 1993, from Keith A. Findley to the Honorable Rudolph T. Randa.

- The letter dated August 18, 1993, and stamped received August 20, 1993, from Keith A. Findley to the Honorable Rudolph T. Randa.

- The letter dated March 2, 1994, and stamped received March 3, 1994, from Keith A. Findley to the Honorable Rudolph T. Randa.

- The letter dated March 29, 1995 and stamped received April 3, 1995, from Keith A. Findley to the Honorable Rudolph T. Randa.

/s/ Sally L. Wellman 5/16/96
SALLY L. WELLMAN Date
Assistant Attorney General
State of Wisconsin

Counsel for Respondent-Appellee

/s/ Keith A. Findley 5/16/96
KEITH A. FINDLEY Date
Assistant State Public Defender
State of Wisconsin

Counsel for Petitioner-Appellant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

Case No. 92-C-690

-vs-

95-3608

JAMES P. MURPHY,

Respondent.

DECISION AND ORDER

Before the Court is petitioner's motion to supplement the appeal record. The respondent stipulates to this motion.

NOW THEREFORE BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

The Clerk of Court shall supplement the appeal record as outlined in the stipulation filed May 21, 1996.

Dated at Milwaukee, Wisconsin, this 23rd day of May, 1996.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U. S. District Judge

ORIGINAL FOR COURT FILE
COPY RETAINED FOR JUDGE'S FILE

Copy mailed to Attorneys for parties by the court pursuant to rule 77(D) Federal rules of civil procedures, 10-20-92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

Civil Action No. 92-C-690

v.

JAMES P. MURPHY, Warden,

Respondent.

ORDER

(Filed Oct. 20, 1992)

IT IS ORDERED that the above-captioned action is TRANSFERRED to Judge Rudolph T. Randa.

Dated at Milwaukee, Wisconsin, this 20th day of October, 1992.

BY THE COURT

/s/ John W. Reynolds
John W. Reynolds
Senior Judge

(SEAL)

THE STATE OF WISCONSIN
STATE PUBLIC DEFENDER

131 West Wilson Street Room 750 53703 3333,
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(608) 266-3440

State Public Defender Nicholas L. Chiarkas
Chief, Trial Division Ellen K. Berz

Deputy State Public Defender Eileen A. Hirsch
Chief, Appellate Division Kenneth P. Casey

January 22, 1993

The Honorable Rudolph T. Randa
United States District Court
Eastern District of Wisconsin
Federal Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Aaron Lindh v. James P. Murphy
Civil Action No. 92-C-0690

Dear Judge Randa:

On October 20, 1992, I received notice that the Honorable John W. Reynolds had transferred the above referenced case to you. At the time of the transfer, I had pending before the court a motion seeking an order compelling the respondent to file the transcripts in this habeas action. The respondent answered that motion and I replied with a letter suggesting various alternatives for ordering submission of the transcripts and for establishing a briefing schedule. Additional copies of all of these documents are enclosed for your convenience.

Because the briefing schedule, the sequence in which the parties are to submit their briefs, and the issues to be addressed in the initial briefs, are dependent on the court's rulings on the various issues raised in the pending motion and responses by the respondent and petitioner, nothing further has happened on this case since those documents were filed and since the case was transferred to you. I wish to alert you to the fact that these matters are pending and require your resolution so that this case can proceed. If you would find it helpful, I would be happy to participate in a telephone conference call to discuss these procedural issues. Thank you for your attention to this matter.

Respectfully yours,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

KAF:crs

Enclosures

cc: Sally L. Wellman
Assistant Attorney General
Post Office Box 7857
Madison, WI 53707
(without enclosures)

Mr. Sofron Nedilsky
Clerk, U.S. District Court
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, WI 53202
(without enclosures)

(SEAL)

THE STATE OF WISCONSIN
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State Public Defender
Nicholas L. Chiarkas

Chief, Trial Division
Ellen K. Berz

Deputy State Public Defender
Eileen A. Hirsch

Chief, Appellate Division
Kenneth P. Casey

August 18, 1993

Hon. Rudolph T. Randa
United States District Court
Eastern District of Wisconsin
Federal Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 53202

Re: Aaron Lindh v. James P. Murphy
Civil Action No. 92-C-0690

Dear Judge Randa:

Almost one year ago, on or about September 10, 1992, I filed a motion on behalf of the petitioner in this habeas action requesting the court to require the state to file the transcripts of the petitioner's state criminal trial and requesting the court to set a briefing schedule. The respondent answered that motion, and I replied with a letter suggesting various alternatives for ordering submission of the transcripts and for establishing a briefing schedule.

On October 20, 1992, I received notice that the Honorable John W. Reynolds had transferred this case to you. When I did not hear anything further from the court after that, I wrote to you on January 22, 1993, explaining that this case was awaiting a decision on the motion to compel filing of the transcripts and the request for briefing schedule, and advising you that the case could not progress any further until these matters were resolved.

Because I have not heard anything from the court in the seven months since that letter, I again am writing to request that the court address that motion. Because the briefing schedule, the sequence in which the parties are to submit their briefs, and the issues to be addressed in the initial briefs are dependent on the court's rulings on the various issues raised in the pending motion and responses, nothing further has happened or can happen on this case until those issues are resolved. I respectfully request that the court address the issues presenting pending before this court so that this case may proceed. If you would find it helpful, I will be happy to participate in a telephone conference call to discuss these procedural issues. Thank you for your attention to this matter.

Respectfully yours,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

KAF:pgd

cc: Ms. Sally L. Wellman
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mr. Sofron Nedilsky
Clerk of Court
362 Federal Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 53202

(SEAL)

THE STATE OF WISCONSIN
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State Public Defender Nicholas L. Chiarkas

Director, Appellate Division Kenneth P. Casey

Deputy State Public Defender Eileen A. Hirsch

March 2, 1994]

Hon. Rudolph T. Randa
United States District Court
Eastern District of Wisconsin
362 Federal Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 53202

Re: *Aaron Lindh v. James P. Murphy*
Civil Action No. 92-C-0690

Dear Judge Randa:

I am writing once again to ask the court to resolve the preliminary procedural motions pending in the above-referenced case so that this action may proceed. On or about September 10, 1992, I filed a motion on behalf of the petitioner requesting the court to require the state to file the transcripts of the petitioner's state criminal trial and requesting the court to set a briefing schedule. The respondent answered that motion, and I replied with a

letter suggesting various alternatives for ordering submission of the transcripts and for establishing a briefing schedule.

On January 22, 1993, I wrote the court to remind it that these procedural matters were pending and to request that the court address these matters. I wrote the court again on August 18, 1993. Because I still have not heard anything from the court in approximately one and one-half years, I am writing again to ask that some action be taken on this matter.

Sincerely,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

KAF:pgd

cc: Ms. Sally L. Wellman
Assistant Attorney General

cc: Mr. Sofron Nedilsky
Clerk of Court
Eastern District of Wisconsin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

Case No. 92-C-690

-vs-

JAMES P. MURPHY, Warden,

Respondent.

ORDER

(Filed Mar. 4, 1994)

Petitioner has filed a "Petition For Writ of Habeas Corpus" and in connection requests that this Court compel the State to file transcripts from the proceedings which are the subject of this petition.

The respondent, through Assistant Attorney General Sally Wellman, opposes the petition and the motion to compel the State to file the transcripts. Respondent argues that the filing of transcripts *at this time* is unnecessary because the petitioner has no cognizable claim under federal habeas proceedings. More specifically, respondent argues that petitioner has no federal constitutional right to confrontation at the insanity phase of his state trial. Respondent suggests that the Court decided this issue first.

Because the petitioner has no strong objection to the Court proceeding in this manner the Court will decide

the aforesaid issue first and orders that briefs be submitted in the following manner.

> Respondent shall file a brief within 35 days from the date of this Order.
>
> Petitioner shall file a response brief within 70 days from the date of this Order.
>
> Respondent shall have 15 days after petitioner's filing to submit a rebuttal brief.[1]

Dated at Milwaukee, Wisconsin, this 4th day of March, 1994.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U. S. District Judge

[1] The Court reserves ruling on the issue as to which party bears the responsibilty for filing transcripts.

(SEAL)

THE STATE OF WISCONSIN
STATE PUBLIC DEFENDER

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State Public Defender Nicholas L. Chiarkas

Director, Appellate Division Virginia A. Pomeroy

Deputy State Public Defender Eileen A. Hirsch

March 29, 1995

Hon. Rudolph T. Randa
United States District Court
Eastern District of Wisconsin
362 Federal Courthouse
517 E. Wisconsin Avenue
Milwaukee, WI 53202

Re: *Aaron Lindh v. James P. Murphy*
Civil Action No. 92-C-0690

Dear Judge Randa:

Almost a year ago, in May 1994, the parties completed briefing a preliminary issue in this case regarding the applicability of the confrontation clause at the insanity phase of a bifurcated trial in Wisconsin. The case has been ready for a decision from the court on that issue since then.

I am writing at this time simply to remind the court that this matter is pending and ready for decision. In

addition, since the briefing, I have discovered additional authority supporting the petitioner's position that the confrontation clause applies at dispositional-type proceedings, like the insanity phase of a bifurcated trial. In *Huebner v. State*, 33 Wis. 2d 505, 526, 527, 147 N.W.2d 646 (1967), the Wisconsin Supreme Court held that a commitment procedure for sex offenders, invoked in lieu of sentencing, although certainly dispositional in nature, is different than ordinary penal sentencing. The court held that the full panoply of due process rights, including confrontation rights, applies in such a proceeding. The court cited *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir. 1966), in support of this holding. These cases make clear that the confrontation clause applies at a separate commitment proceeding that follows a finding of guilt in a criminal case. Thank you for your consideration.

Sincerely,

/s/ Keith A. Findley
KEITH A. FINDLEY
Assistant State
Public Defender

KAF:pgd

cc: Ms. Sally L. Wellman
Assistant Attorney General

cc: Mr. Sofron B. Nedilsky
Clerk of U.S. Dist. Court of Eastern Dist.
of Wisconsin

---

156 Wis.2d 768

STATE of Wisconsin,
Plaintiff-Respondent,*

v.

Aaron LINDH, Defendant-Appellant.

No. 89-0896-CR.

Court of Appeals of Wisconsin.

Submitted on Briefs Dec. 8, 1989.

Opinion Released May 24, 1990.

Opinion Filed May 24, 1990.

Defendant was convicted of murder. Judgment was entered in the Circuit Court, Dane County, Robert R. Pekowsky, J. Defendant appealed. The Court of Appeals, Gartzke, P.J., held that: (1) psychiatrist interviewing suspect shortly after incident did not improperly advise him of his rights to remain silent, and (2) trial court committed prejudicial error by refusing to permit defendant to cross-examine psychiatrist as to charges that he had sexually abused his patients.

Reversed and remanded.

Before GARTZKE, P.J., and SUNDBY and DYKMAN, JJ.

GARTZKE, Presiding Judge.

Aaron Lindh appeals from a judgment of conviction of two counts of first-degree murder, sec. 940.01(1), Stats.

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*Petition for Review granted.

1985, while using a dangerous weapon, sec. 939.63(1)(a)2, Stats., of attempted first-degree murder while using a dangerous weapon, sec. 939.32(1)(a), and of carrying a firearm in a public building, sec. 941.235(1), Stats.

On January 15, 1988, Lindh carried a shotgun into the City-County Building in Madison, Wisconsin, and shot three people he did not know. When deputy sheriff Louis Molnar ordered Lindh to stop and put down his weapon, Lindh advanced on him while shouting "Shoot me! Kill me!" Lindh and Molnar simultaneously fired at each other. Lindh was hit and disabled. Molnar was not hit. Two of Lindh's three victims died.

Lindh pled not guilty by reason of mental disease[1] to all charges. A bifurcated trial was held pursuant to sec. 971.165, Stats. He pled guilty to the firearm charge and the dangerous weapon penalty enhancer and was found guilty of the other charges by a jury. The jury then found

---

[1] Section 971.15, Stats., provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

(2) As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

Lindh did not have a mental disease at the time of the shootings. Lindh challenges only that finding.

Lindh contends that the trial court erred by refusing to suppress statements he made to a psychiatrist. We conclude that the court did not err in that regard. Lindh also contends that he should have been allowed to cross-examine the psychiatrist about pending investigations into his sexual misconduct with patients. We agree, and because the error was prejudicial, we reverse the judgment and remand for a new trial as to Lindh's mental state.

1. FACTS

Lindh was taken to the hospital after deputy Molnar shot him, was placed under general anesthesia, and underwent surgery which ended at 3:30 p.m. Lindh was then sedated, placed in intensive care, and given pain medication.

During the afternoon, the prosecutor assigned to the case retained Dr. Leigh Roberts, a psychiatrist with a specialty in forensic psychiatry. The prosecutor told Dr. Roberts that a shooting had occurred, that Lindh was in custody, and that questions might be raised regarding his mental state during the shooting. The prosecutor asked Dr. Roberts to interview Lindh.

At 8:34 p.m., two Madison detectives questioned Lindh in intensive care. They questioned him for thirty minutes after first identifying themselves and warning him in accordance with *Miranda v. Arizona*, 384 U.S. 436,

86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[2] They concluded the interview when Lindh said he was thirsty and was starting to feel some pain.

At 9:33 p.m., Dr. Roberts came to Lindh's hospital room. At the suppression hearing, Dr. Roberts testified as follows:

> Q: When you first contacted [Lindh], what did you tell him, if anything?
>
> A: When I first contacted him, I introduced myself. I explained that you [the prosecutor] had sent me. I explained the purpose of the examination, related to my determining his mental state as of that time and as of earlier that day. As I went through each of the items with him, I asked him if he understood and got a verbal affirmative response from him. I explained to him that our discussion was not of a confidential nature, that anything that was reported could subsequently be reported to other persons, since it was done at the request of the District Attorney's office and it related to legal matters. I explained to him that he did not have to speak with me. I asked him if he had an attorney. He indicated, "No." I asked him if he wanted an attorney before he spoke with me. And, again, he indicated, "No." I asked him if he understood that he was giving up his right to have an attorney before talking with me, if he did talk with me. And he indicated he did. I explained to him that the concerns about his mental state had to do with was he at risk to harm himself.
>
> . . . .
>
> I explained to him, also, that the purpose of the examination had to do with his mental abilities now, in terms of talking with people, and my assessment of his mental abilities that afternnoon, and that that might be used later in a court process, concerning was he mentally responsible.
>
> . . . .
>
> Q: Did you indicate to him, sir, that if he couldn't afford to hire an attorney, one would be provided for him, before you talked to him?
>
> A: No. I did not. Dr. Roberts did not tell Lindh that he could stop the questioning at any time.

Dr. Roberts asked Lindh if he could recall what had happened earlier that day in the City-County Building. Lindh said he had a limited amount of recall but remembered shooting three people. When asked why, Lindh responded that he did not know and that he did not want

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[2] One of the detectives read Lindh his rights from a card which said: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have a lawyer present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed at county expense to represent you before any questioning, if you so wish. You can decide at any time to exercise these rights and not answer any questions or make any statements." The detective asked Lindh after each sentence whether he understood it. Lindh each time stated that he did. When asked whether he was willing to talk with those rights in mind, Lindh responded, "Sure."

to discuss the details at that time. Dr. Roberts then suggested that Lindh might want to reconsider whether to talk at all because he did not have a lawyer. Lindh responded by closing his eyes. Dr. Roberts stated that he would leave, wait a few minutes, and then return.

Dr. Roberts left Lindh and returned twelve minutes later. Lindh said he understood that he did not have to talk with Dr. Roberts and understood why Dr. Roberts was there. Dr. Roberts then mentioned the absence of a lawyer but Lindh said he would talk. Dr. Roberts asked Lindh about his background, what had led to the shooting incident, and his past and present mental state. This second meeting lasted for about thirty minutes.

On March 8, 1988, Dr. Roberts learned that the University of Wisconsin hospital was investigating a claim that he had engaged in sexual misconduct with a female patient. He knew of sec. 940.22, Stats., which provides criminal penalties for the sexual exploitation of a patient by a therapist. In May 1988, he learned that the Medical Examining Board was investigating charges against him. The complaint before the board alleged several incidents of sexual misconduct by Dr. Roberts with three female patients.

On April 8, 1988, Lindh moved to suppress his statements to the police and Dr. Roberts because they were obtained in violation of *Miranda*. The trial court denied the motion by decision and order filed September 15, 1988.

Meanwhile, on June 22, 1988, Dr. Roberts again interviewed Lindh in the Dane county jail. The next day, the hospital referred the investigation of Dr. Roberts' sexual

misconduct to the Dane county district attorney. The district attorney immediately sought to have a special prosecutor appointed. The circuit court made the appointment on June 28, 1988. Dr. Roberts learned of the appointment on July 8, 1988. On August 17, 1988, he issued a report concluding that Lindh did not suffer from a mental disease on the day of the shooting. On August 22, 1988, he again interviewed Lindh.

The state moved the trial court in limine to prohibit any inquiry at trial about the allegations of sexual misconduct against Dr. Roberts or any possible ramifications of the allegations. The court granted the motion.

At the mental disease stage of the trial, Dr. Ezra Griffith testified on behalf of Lindh. Dr. Griffith is a specialist in forensic psychiatry and an associate professor of psychiatry at Yale University. He opined that at the time of the shooting Lindh suffered from a mental disease. He was in the throes of a psychotic state diagnosed as a brief reactive psychosis. As a result of that state, Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

Dr. Griffith also testified that long before the shooting Lindh had suffered from mental disorders. Dr. Griffith characterized Lindh's long-term disorder as a mixed personality disorder which fit into two diagnostic categories: borderline personality disorder and narcissistic personality disorder. He then described the relationship between the long-term disorders and Lindh's psychotic state at the time of the shooting. He testified

that brief reactive psychoses are known complications of each personality disorder.

Dr. Roberts was the state's principal witness. While being qualified in the presence of the jury as an expert witness, Dr. Roberts noted that he had "eight grandchildren up to nearly the age of Mr. Lindh," that he was a faculty member of the University of Wisconsin Medical School, an adjunct faculty member of the San Francisco Theological Seminary, and on the board of trustees of North Central College, that he had served on various committees dealing with mental retardation, rehabilitation, and the sex crimes law, that he had chaired conferences on mental health in relation to religion, rehabilitation, and law, and that he had recently been honored "as essentially the mid-west psychiatrist of the year." He had testified "several hundred times" on the mental condition of persons who have committed crimes.

Dr. Roberts opined that Lindh was not suffering from a mental disease at the time of the shooting. He had an antisocial personality disorder but that is not a mental disease. He had neither a borderline nor a narcissistic personality disorder. He did not suffer a brief reactive psychosis.

Dr. Roberts implied he had an advantage in diagnosing Lindh's mental state because he had interviewed Lindh within hours of the crime. When asked how important it was to see Lindh on the day of the shooting, Dr. Roberts testified:

> It's very important. It's not always essential. . . . However, it is very helpful to have had the first hand experience and to be able to do a professional evaluation that close in time to the actual event and to see what he looked like in that immediate period, that particular day within just a few hours of the time that [the] behavior occurred. . . .

The state also called Dr. Frederick Fosdal, a psychiatrist, as an expert witness. Dr. Fosdal was present during the testimony of the other two doctors and had available to him most of the same materials they relied upon. He testified that he had twice talked with Lindh for three hours and the information he obtained during those interviews was identical to that the other doctors obtained.

Dr. Fosdal opined that Lindh was not suffering a brief reactive psychosis on the day of the shootings. Lindh had no mental disease on that day. He agreed with Dr. Griffith that Lindh fit the category of mixed personality disorder. He conceded that Lindh might have the traits of both a narcissistic personality disorder and a borderline personality disorder. He agreed that brief reactive psychoses are possible complications of each disorder and that a brief reactive psychosis is a mental disease.

The jury found that Lindh was not suffering from a mental disease at the time of the shootings in the City-County Building on January 15, 1988. The trial court entered the judgment of conviction from which Lindh appeals.

2. VIOLATION OF MIRANDA RIGHTS

The prosecution stipulated that Dr. Roberts acted as an agent of the police when he initially questioned Lindh after his surgery. As a police agent, Dr. Roberts was required to give *Miranda* warnings.

Lindh argues that Dr. Roberts gave him insufficient *Miranda* warnings when interviewing him on the day of the shooting. Lindh notes that Dr. Roberts failed to advise him that he had the rights to have counsel appointed for him if he could not afford counsel and to cut off questioning at any time. He also argues that Dr. Roberts failed to scrupulously honor Lindh's invocation of his right to remain silent.

The state denies that Lindh's *Miranda* rights were violated. It argues in the alternative that the privilege against self-incrimination does not apply to the mental disease phase of a bifurcated trial. We conclude that Lindh's *Miranda* rights were not violated. We therefore do not reach the state's alternative argument.

That Dr. Roberts gave Lindh incomplete *Miranda* warnings is undisputed. However, Lindh admits that a detective had given him a complete set of warnings an hour before Dr. Roberts arrived. Lindh ended his conversation with the detectives by stating that he was thirsty and feeling some pain, not by invoking his right to remain silent or his right to an attorney. When Dr. Roberts arrived, he explained to Lindh that he had the right not to talk and asked Lindh if he wanted counsel before questioning.

Given the complete *Miranda* warnings to Lindh an hour earlier, we conclude that Dr. Roberts gave him "the now familiar *Miranda* warnings . . . or their equivalent." *California v. Prysock*, 453 U.S. 355, 360, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981) (emphasis in original) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 297, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 [1980]). "It would be strange indeed for [a] court to hold that, where within the space of a few hours a defendant has been properly advised of his rights, a subsequent confession would be vitiated by an admonition that was somewhat less than technically perfect." *Grennier v. State*, 70 Wis.2d 204, 213, 234 N.W.2d 316, 321 (1975). Here only an hour intervened between Lindh's being properly advised and the less than complete admonitions.

Lindh argues that he invoked his right to remain silent by telling Dr. Roberts that he did not want to discuss the details of the shootings and by closing his eyes when Dr. Roberts said he might want to reconsider whether to have an attorney present. We disagree.

Lindh did not invoke his right to remain silent but rather expressed initial reluctance to discuss a topic. *People v. Galimanis*, 765 P.2d 644, 647 (Colo.Ct.App.1988), *cert. granted*, 783 P.2d 838 (Colo.1989). Dr. Roberts gave Lindh a few minutes to reconsider whether he wanted to talk at all and whether he wanted an attorney. Lindh acquiesced by closing his eyes. He at no time stated he did not wish to talk or that he wanted an attorney. When Dr. Roberts returned, Lindh agreed to talk, answered background questions, and then freely discussed details of the shootings. As in Galimanis, "[t]here is nothing in the record to show that his comments were coerced or involuntary in

any way, or that his responses were the result of surreptitious mental invasion." *Id.* (citing *Early v. Tinsley,* 286 F.2d 1 [10th Cir.1960], *cert. denied,* 365 U.S. 830, 81 S.Ct. 717, 5 L.Ed.2d 708 [1961]).

Having concluded that Lindh's *Miranda* rights were not violated, we need not and do not decide whether statements taken in violation of *Miranda* must be suppressed in the mental disease phase of a bifurcated trial.

3. IMPEACHMENT OF PSYCHIATRIST

Lindh argues here, as he forcefully argued to the trial court, that he should have been allowed to cross-examine Dr. Roberts about the pending investigations concerning his alleged sexual misconduct with patients. Lindh avers that the error prejudiced him and violated the confrontation clause of the sixth amendment to the United States Constitution. We conclude prejudicial error occurred and do not reach the constitutional question.

The trial court precluded Lindh's cross-examining Dr. Roberts regarding the investigations on grounds that the matter was irrelevant to the sanity issues and did not support Lindh's theory that Dr. Roberts was biased. We will sustain the exclusion of evidence on relevancy grounds unless the trial court abused its discretion. *Rogers v. State,* 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980). "The proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." *Id.* In Wisconsin, any relevant

matter may be inquired into on cross-examination without regard to the scope of direct examination. *Id.*

Lindh contends that the evidence of the pending investigation was relevant to Dr. Roberts' truthfulness. He asserts that the evidence tended to show bias because Dr. Roberts faced possible criminal charges and might want to curry favor with the prosecutor and affected his credibility as a supposedly "impartial professional who is just rendering an objective opinion." The state responds that any connection between the pending investigations and Dr. Roberts' professional opinion on Lindh's mental state is far-fetched. The criminal investigation had been referred by the Dane county district attorney to a special prosecutor. No criminal charges had been brought against Dr. Roberts. No deal had been struck.

However, in this case, as in Rogers, the credibility of the witness whose impeachment was disallowed was an unusually important factor. *Rogers,* 93 Wis.2d at 691, 287 N.W.2d at 778. Although Dr. Roberts was not the state's only expert witness, he implied that he was situated advantageously because he was the only psychiatrist who saw Lindh on the day of the shootings. He disputed each contention of Lindh's expert. And his profession and livelihood could be jeopardized if he were convicted of sexual misconduct with a patient.[3]

> A trial court should be particularly solicitous of cross-examination intended to disclose bias or

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[3] A "therapist" (which includes a physician) "who intentionally has sexual contact with a patient . . . during any ongoing therapist-patient . . . relationship" is guilty of a class D felony. Sec. 940.22(2), Stats.

> prejudice; e.g., a broad opportunity for examination should be allowed if its objective is to establish that an adverse witness in a criminal matter is giving his testimony in anticipation of favorable personal treatment, such as, police leniency by the state. . . .
>
> . . . The mere possibility of future criminal charges is a sufficient basis to explore the motives of the witness on cross-examination [and to] place his apprehensions thereof before the jury.

State v. Chesnut, 621 P.2d 1228, 1233 (Utah 1980), disapproved on other grounds, *State v. Crick*, 675 P.2d 527, 531 (Utah 1983).

While the record discloses no direct evidence that any state authority threatened or promised anything to Dr. Roberts, the jury could have reasonably inferred that a witness in the position of Dr. Roberts would perceive that he would benefit if he testified against Lindh or that he would suffer retaliation if he testified in favor of Lindh. The jury could consider those inferences strengthened by the circumstances of Lindh's crime.[4] Whether or not the trial judge or the judges of the court of appeals would draw those same inferences is not the question. We leave such matters to juries if the inferences are reasonable.

We conclude the trial court abused its discretion by not permitting cross-examination of Dr. Roberts regarding the pending investigations of sexual misconduct. The

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[4] Lindh killed two county employees and attempted to kill an employee of the state's justice department.

jurors were entitled to know the facts from which they could reasonably infer possible bias on the part of the state's most important witness in the mental disease phase of Lindh's trial. They should have heard evidence useful to them "in appraising the credibility of the witness and evaluating the probative value of the direct testimony." *Rogers*, 93 Wis.2d at 689, 287 N.W.2d at 777.

The error prejudiced Lindh. If the jury had disbelieved Dr. Roberts, they could have relied upon the other expert for the state, Dr. Fosdal. His testimony was significantly more guarded than Dr. Roberts'. Dr. Fosdal agreed with Dr. Griffith that Lindh fit the category of mixed personality disorder and conceded Lindh might have the traits of narcissistic and borderline personality disorders. Dr. Fosdal conceded that brief reactive psychoses are known complications of the latter two disorders. If the jury had been given reason to doubt Dr. Roberts' diagnoses, it could have concluded Lindh had suffered a brief reactive psychosis and therefore a mental disease.

A reasonable possibility exists that the error contributed to the jury's finding that Lindh did not suffer from a mental disease at the time of the shootings. That being the case, we cannot find that the error was harmless. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

We conclude the second phase of the bifurcated proceeding must be retried. We do not reach the issue whether the error deprived Lindh of his rights under the confrontation clause of the sixth amendment. *See Id.* at 533, 370 N.W.2d at 227 (appellate court need not address

claim of constitutional error if relief available on statutory or common law grounds).

Judgment reversed and cause remanded for a new trial as to whether Lindh is not guilty of the charges by reason of mental disease or defect.

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161 Wis.2d 324

STATE of Wisconsin,
Plaintiff-Respondent-Petitioner,

v.

Aaron LINDH, Defendant-Appellant.

No. 89-0896-CR.

Supreme Court of Wisconsin.

Argued Jan. 25, 1991.

Decided April 17, 1991.

STEINMETZ, Justice.

The principal issue in this case is whether the trial court abused its discretion by ruling in favor of the state's *in limine* motion to restrict defense impeachment of one of the state's psychiatric witnesses during the mental capacity phase of the bifurcated trial.

A second issue is whether the trial court abused its discretion during the mental capacity phase of the trial by refusing to suppress the use of statements taken from the defendant by a psychiatric witness within hours of the defendant's arrest.

With respect to the first issue, the court of appeals reversed the circuit court for Dane county, Judge Robert R. Pekowsky, holding that the trial court's order restricting defense impeachment of the state's psychiatric witness was an abuse of discretion and remanding the case for a new mental capacity phase of the trial. With respect to the second issue, the court of appeals affirmed the trial

court's decision allowing the introduction of the defendant's statements.[1]

We reverse the court of appeals and hold that the trial court did not abuse its discretion in granting the state's motion *in limine*. We affirm that portion of the court of appeals decision which held that the trial court did not err by refusing to suppress the use of the statements challenged by the defense.

* * *

The issues relate only to "phase II," the mental capacity phase of a bifurcated trial, pursuant to sec. 971.165, Stats. At phase I, the guilt phase of the trial, the defendant, Aaron Lindh, was charged with the following offenses: two counts of first-degree murder, contrary to sec. 940.01, Stats.; one count of attempted first-degree murder, contrary to secs. 939.32(1)(a) and 940.01; committing the acts alleged above while using a dangerous weapon, contrary to sec. 939.63(1)(a)2; and one count of carrying a firearm in a public building, contrary to sec. 941.235(1). Lindh pleaded guilty to the firearm and dangerous weapon charges and was found guilty of the other charges by a jury. At phase II of the trial, Lindh, pursuant to sec. 971.15,[2] claimed he had a mental disease at the

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[1] *State v. Lindh*, 156 Wis.2d 768, 457 N.W.2d 564 (Ct.App.1990).

[2] Section 971.15, Stats., provides as follows:

> **Mental Responsibility of defendant.** (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

time of the crimes and so pleaded not guilty for that reason. The jury found that Lindh did not have a mental disease at the time of the crimes. Accordingly, a judgment of conviction was entered against Lindh on all charges.

The charges arose out of an incident occurring during the noon hour of January 15, 1988. Lindh was in the City-County Building in Madison, Wisconsin, to meet with officers of the Madison Police Department.[3] After talking with certain police officers, Lindh apparently left the building and went to his automobile parked nearby, in which he had a modified .22-caliber rifle. Lindh then reentered the building and proceeded to walk into an office of the Dane County Sheriff's Department, hiding the rifle under the coat he was wearing. There, he summarily shot and killed Eleanor Townsend, a sheriff's department secretary, adn [sic] then shot and seriously injured Erik Erikson, a private citizen who was present for the purpose of paying a parking ticket. He then proceeded to the county coroner's office, where he shot and killed Clyde

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> (2) As used in this chapter, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> (3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

[3] The meeting evidently was either for the purpose of discussing the department's progress concerning its investigation of two burglaries of Lindh's apartment that had occurred during the previous week or for the purpose of discussing the imminent disposition of a charge Lindh was facing.

Chamberlain, the coroner. He then brandished the gun at a deputy sheriff, advanced on the officer and challenged the officer to shoot and kill him. Lindh was shot, disabled and transported to Madison Meriter Hospital where he underwent surgery. After surgery, Lindh was taken to the hospital's intensive care unit where he remained through the evening.

Late in the afternoon of the shootings, Dane County Assistant District Attorney John Burr retained Dr. Leigh Roberts, whom Burr considered "one of the best forensic psychiatrists around." Dr. Roberts was informed of the shootings. He was told that Lindh had been taken into custody, that questions might be raised regarding Lindh's mental state during the shootings, and that he might be requested to interview Lindh in this connection.

That evening, shortly after 8:30 p.m., two detectives from the Madison Police Department visited Lindh in the intensive care unit. They identified themselves to Lindh as police officers and indicated that they wanted to talk with him about the shootings in the City-County Building earlier that day. The detectives fully advised Lindh of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)[4], which rights he waived. The detectives questioned Lindh for approximately 35 minutes.

At 9:00 p.m. that evening, the district attorney's office contacted Dr. Roberts at his home and requested that he interview Lindh that same evening. Dr. Roberts

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[4] *See State v. Hernandez*, 61 Wis.2d 253, 257, 212 N.W.2d 118 (1973), in which these rights are set forth and discussed.

agreed to do so and arrived at Lindh's bedside at 9:33 p.m. He explained to Lindh that Assistant District Attorney Burr had sent him and indicated that the interview was taking place "at the request of the District Attorney's office." Before beginning his interview of Lindh, Dr. Roberts essentially reiterated to him all of his *Miranda* rights, except that he did not inform him that before any interview an attorney would be provided to him at county expense if he wanted and could not afford one. Dr. Roberts also informed Lindh that the purpose of his interview related to assessing Lindh's mental state at the time of the shootings. Lindh did nothing to suggest that he was not disposed to such an interview.

Dr. Roberts began to question Lindh, asking him if he could recall what happened earlier that day in the City-County Building. Lindh said he had a limited amount of recall but described shooting two men and a woman. When asked why he shot them, Lindh responded that he did not know. When asked if he cared to discuss the details of the shootings, he answered in the negative. At that point, Dr. Roberts suggested to Lindh that he might not want to talk with him at all, since Lindh did not have an attorney present. "Well," Dr. Roberts said to Lindh, "I'll wait a few minutes and come back and talk with you again." Dr. Roberts then left the defendant alone because, in his words:

> I wanted to be very sure that he understood, really, the purpose of my being there, and that he understood his rights in relation to anything that he might share with me, because, in general, I'd much prefer that he have an attorney

prior to that time, and that his attorney be aware that he was talking with me.

Twelve minutes later, Dr. Roberts returned to Lindh's bedside. Before talking with Lindh, Dr. Roberts again generally informed him of his rights concerning the interview. Lindh responded that he understood he did not have to talk with Dr. Roberts and understood why Dr. Roberts was with him. Lindh again affirmed that he understood that anything said would not be confidential. Again, Dr. Roberts suggested to Lindh that he might want to have an attorney before he talked. Lindh indicated, however, that he would talk with Dr. Roberts.

Dr. Roberts proceeded to question Lindh about the shootings as well as about his personal and family background. Lindh again indicated that he shot three human beings, none of whom he knew personally, that day at the City-County Building. He also spoke of two burglaries of his apartment that had taken place within the past week, the second occurring on the eve of the shootings. In addition, he indicated that he was dissatisfied and angry after the meeting he had with police at the City-County Building some minutes prior to the shootings. In response to questions from Dr. Roberts concerning his recent and current mental state, Lindh indicated that he was not suicidal, that he did not have significant depression, that he was not experiencing hallucinations, hearing voices or seeing visions, and that he had not been experiencing any significant eating or sleeping problems. Dr. Roberts later testified to his opinion that Lindh, based upon his ability to converse, absence of slurred speech, and responsive answers to specific questions the nature of which is indicated above, was able to understand what was taking

place and being said at the interview. Dr. Roberts stopped the interview at about 10:25 p.m., when Lindh indicated he was experiencing some pain.

On February 26, 1988, Lindh was arraigned and entered his pleas of not guilty and not guilty by reason of mental disease. At the request of the district attorney, the court appointed Dr. Roberts and Dr. Frederick Fosdal, another forensic psychiatrist, to examine the defendant on behalf of the state.

On March 8, 1988, Dr. Roberts became aware of allegations of professional misconduct against him. Specifically, he became aware that the University of Wisconsin Hospital was investigating an allegation that he had engaged in sexual misconduct with a female patient. He gave no particular thought at the time to the fact that there was a potential for a criminal charge to be made against him and that such a charge could involve the Dane County District Attorney's office. However, he generally knew at the time about the existence of a state law which could subject him, as a therapist, to criminal penalties if such an allegation as that made against him were true.[5] He was not aware of what penalty could be prescribed if he were charged and convicted. He presumed that, were any prosecution to be carried out, it would happen in Dane county, where the allegations were made and therefore would be conducted by the Dane county district attorney's office.

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[5] Specifically, sec. 940.22, Stats., provides criminal penalties for the sexual exploitation of a patient or client by a therapist.

In May 1988, Dr. Roberts learned that the Medical Examining Board was also investigating allegations of sexual misconduct by him with three female patients after the examining board made a request of him to provide it with records.

Dr. Roberts interviewed Lindh again on June 22, 1988, at the Dane county jail. The next day, June 23, University of Wisconsin Hospital attorneys met with Dane County District Attorney Hal Harlowe and referred to him the allegations against Dr. Roberts. At the same meeting, Harlowe informed those attorneys that he would transfer the matter to a special prosecutor. After the meeting, Harlowe immediately undertook to transfer the matter to the office of Milwaukee County District Attorney E. Michael McCann so as to establish that office as special prosecutor in the matter.

The Dane county district attorney's office sought this transfer in light of the fact that it had worked closely with Dr. Roberts on the prosecution of a number of past and pending cases. The district attorney's office considered that that relationship could constitute a conflict of interest for both Dr. Roberts and the district attorney's office if it were to investigate or prosecute Dr. Roberts. The Dane county circuit court officially appointed the Milwaukee county district attorney's office as special prosecutor on June 28 or 29, 1988.

Dr. Roberts was never contacted by any member or representative of the Dane county district attorney's office, nor was he contacted by any police officer, concerning the allegations against him. Nor did anyone from

the Dane county district attorney's office have any contact with Dr. Roberts' attorney about the allegations. Not until July 8, 1988, did Dr. Roberts become aware, through his attorney, that allegations had been referred to the Dane county district's office; at the same time, he became aware that the special prosecutor already had been appointed.

No formal or informal decision was made by the Dane county district attorney's office as to whether any criminal investigation or charges should be made against Dr. Roberts prior to the appointment of the special prosecutor. No one from the Dane county district attorney's office had any contact with the special prosecutor or discussed the matter with the special prosecutor after the special prosecutor appointment.

On August 17, 1988, Dr. Roberts submitted a report concluding that Lindh was not suffering from a mental disease or defect at the time of the shootings. On August 22, 1988, he interviewed Lindh for the last time.

On September 7, 1988, the defense filed a "Specific Demand for Exculpatory Evidence" regarding the complaint against Dr. Roberts before the Medical Examining Board. The complaint was attached to the discovery demand in which the defense set forth a list of specific questions to be answered, including questions as to when Dr. Roberts first became aware that the allegations had been made; when he was first aware the allegations could result in criminal charges; when the allegations were referred to the Dane county district attorney's office; when a special prosecutor was appointed, when Dr. Roberts became aware of this; and whether the Dane

county district attorney's office had made any decision as to whether charges should be filed.

The state promptly responded to the demand, denying that any of the material requested was exculpatory but fully answering each and every question set forth by the defense.[6] The state also filed, on September 12, 1988, a motion *in limine* requesting that the trial court prohibit any cross-examination of Dr. Roberts concerning the allegations of misconduct pending against him or concerning any ramification of those pending allegations, including but not limited to the status of Dr. Roberts' hospital privilege at the University of Wisconsin Hospital. The motion asserted that any such inquiry by the defense would be "totally irrelevant and immaterial to the issues" before the court.

A hearing on the state's motion was held on September 13, 1988. At that hearing, the defense acknowledged that the state had fully complied with its discovery demand. It also indicated it was alleging no wrongdoing or bad faith on the part of the prosecution. The parties argued the merits of the state's motion, the defense arguing that the circumstances raised serious questions relating to the bias, motive and interest of Dr. Roberts. The defense also argued more generally that Lindh should be permitted to explore the credibility of Dr. Roberts as an expert witness. In this connection, the defense, although it had no support in the record upon which to base its position, asserted that University of Wisconsin Hospital

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[6] The information contained in the state's answers, entirely undisputed by the defense, is incorporated within this factual portion of this opinion.

had temporarily suspended Dr. Roberts' privilege to treat patients at that institution after conducting its own investigation. Lindh argued that he should be permitted, during his own questioning on Dr. Roberts' qualifications, to question Dr. Roberts concerning the allegations against him and his purported suspension so that the prosecution would not be able to present Dr. Roberts as "pure as the driven snow."

The state argued that the allegations contained in the board's complaint were not relevant to the issues of bias, motive or interest. The state argued that the allegations did not go to bias because when Dr. Roberts was retained and appointed, the prosecution was not looking to him for any particular result from his evaluation of Lindh but simply his professional opinion. In this regard, the state noted that some five weeks prior to the filing of his report Dr. Roberts was aware that a special prosecutor had been appointed and that the Dane county district attorney's office had absolutely no involvement with the case. The prosecutor argued it was too implausible to think Dr. Roberts would file a report with the hope that it would help him in Dane county when he knew that the matter was under Milwaukee county jurisdiction. Even if the proffered evidence were marginally relevant, the state said, it would be extremely prejudicial and cause the jury to focus on an issue unrelated to the question of Lindh's mental capacity at the time of the shootings, and therefore should not be allowed.

Concerning the defense's more generally stated line of inquiry as to Dr. Roberts' character or credibility as an expert witness, the state responded that an expert witness should be treated like any other witness and that there

was no basis to question Dr. Roberts about the allegations. The state argued that cross-examination pertaining to the allegations of sexual misconduct and purported hospital suspension would serve no purpose insofar as those matters did not reflect on Dr. Roberts' qualifications as an expert witness. Such cross-examination, the prosecution said, would serve only to "trash" Dr. Roberts, to put him on trial and draw the issue away from the mental responsibility of Lindh.

Following extensive arguments by the parties, the trial court, after having "given a lot of thought to this," found the proffered evidence to be "irrelevant and immaterial." Rejecting the defense's theories of relevancy, the trial court expressly considered that, particularly given that the matter of the allegations against Dr. Roberts was transferred "almost instantaneous[ly]" out of the Dane county district attorney's office to the office of the special prosecutor, there was no possibility of bias, motive or interest on the part of Dr. Roberts. "I do not find anything in this record which would support or permit counsel to inquire as to [that issue]," the court said. The trial court added:

> And I think it's fair to say that, no matter what [Dr. Roberts does] for the Dane county district attorney's office, [he] would not be able to influence any result, as a result of [the special prosecutor's] investigation or any judge that might ultimately hear it, should there be any criminal charges filed.

Even though it had already found the proffered evidence not relevant, the trial court apparently assumed for the sake of argument that the proffered evidence might

be at least marginally relevant such that it should be "balanced" against the risk of unfair prejudice so as to determine its admissibility pursuant to sec. 904.03, Stats. In conducting its balancing test, the trial court found that the risk of unfair prejudice to the state would outweigh any relevance. The court expressly noted that the allegations against Dr. Roberts were nothing more than allegations and said that there was the risk that the jury would think that "if there's smoke, there's fire." Thus, the court held that cross-examination pertaining to the allegations against Dr. Roberts and his purported hospital suspension was not admissible. The court therefore granted the motion *in limine*.

At the same time, the court gave defense counsel the right to *voir dire* Dr. Roberts outside the presence of the jury, and a voir dire hearing took place before Dr. Roberts testified at phase II of the trial. The hearing essentially amounted to a reiteration by Dr. Roberts of much of the information contained in his response to Lindh's discovery demand. In addition, Dr. Roberts stated at the hearing that when he was first called into the case by Assistant District Attorney Burr he was not aware that any allegations against him were threatened. He also stated that he was not aware that District Attorney Harlowe had met with University of Wisconsin Hospital attorneys until the date of the hearing. The defense did not dispute these statements by Dr. Roberts. Based upon the voir dire hearing, the trial court found no basis to alter its ruling granting the motion *in limine*.

At phase II, Dr. Ezra Griffith, a forensic psychiatrist, testified for the defense. After giving a lengthy introduction as to his professional qualifications and background,

Dr. Griffith testified to a reasonable degree of medical certainty that on the day of the killings the defendant was in a psychotic state which he diagnosed as a "brief reactive psychosis," and that as a result of that psychotic state Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct and lacked substantial capacity to conform his conduct to the requirements of law. He also testified to a reasonable degree of medical certainty that Lindh had been suffering from mental diseases or disorders long before January 15, 1988. He characterized these long-term disorders as "mixed personality disorder."

The principal expert witness for the state was Dr. Roberts. At the outset of his testimony, Dr. Roberts indicated that he was: a faculty member at the University of Wisconsin Medical School; "on the adjunct faculty at San Francisco Theological Seminary;" chairperson of conferences "relating to religion and mental health;" previously "honored . . . as essentially the mid-west psychiatrist of the year;" and, a grandfather. Dr. Roberts proceeded to give his opinion that the defendant did not suffer a mental illness at the time of the crimes, that a personality disorder is not a mental disease, and that a conduct disorder is not a mental disease. He testified to his opinion that the defendant was not suffering a brief reactive psychosis at the time of the offenses. He gave his opinion that the defendant knew his conduct was wrong and that he could conform his conduct to the requirements of the law.

The state also called Dr. Fosdal who stated that he diagnosed Lindh as suffering a mixed personality disorder. He testified, however, that such a disorder does not

prevent one from appreciating the wrongfulness of his conduct or from conforming his conduct to the requirements of the law. He testified to his opinion that the defendant did not suffer a brief reactive psychosis at the time of the crimes, did not have a mental disease, and suffered no impairment of his ability to conform his conduct to the requirements of the law.

* * *

With respect to the first issue, Lindh contends that the evidence he wished to show on cross-examination of Dr. Roberts was wrongfully excluded to the extent it might have shown bias on the part of Dr. Roberts, who, facing the possibility of a criminal investigation and criminal charges, allegedly might have wanted to curry favor with the prosecutor by reporting a diagnosis of Lindh's mental state that would favor the prosecution against Lindh. Lindh also asserts more generally that the evidence was relevant to Dr. Roberts' character and credibility.

The confrontation clause of the Sixth Amendment of the United States constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." By virtue of the fourteenth amendment, this right is applicable to the citizens of this state. Article I, sec. 7 of the Wisconsin constitution essentially provides the same right, indicating that an accused has a right to meet his witnesses "face to face." " ' "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" ' " *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986), *quoting Davis v. Alaska*, 415

U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (Emphasis in original). " '[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' " *Id.* at 678-79, 106 S.Ct. at 1435.

Nevertheless:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Id. at 679, 106 S.Ct. at 1435. The confrontation clause " 'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.' " *Id.*, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (Emphasis in original).

Wisconsin evidence law conforms with these fundamental precepts. If evidence is relevant, as defined by sec. 904.01, Stats.,[7] it is admissible, unless its introduction would be prohibited by another rule or the constitutions

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[7] Section 904.01, Stats., provides:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

of the United States or Wisconsin. Section 904.02, Stats.[8] Even if admissible, evidence may be excluded if its probative value is substantially outweighed by other factors, including risk of unfair prejudice. Section 904.03.[9] Section 906.08.[10] pertains specifically to evidence of character and conduct of witnesses.

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[8] Section 904.02, Stats., provides:

> All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

[9] Section 904.03, Stats., provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[10] Section 906.08, Stats., provides as follows:

> Evidence of character and conduct of witness. (1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11(2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: a) the evidence may refer only to character for truthfulness or untruthfulness, and b), except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's

"The criterion of relevancy is whether the evidence sought to be introduced would shed any light on the subject of inquiry." *Rogers v. State*, 93 Wis.2d 682, 688, 287 N.W.2d 774 (1980). In *Rogers*, we also said that:

> The proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony.

Id. at 689, 287 N.W.2d 774. The scope of cross-examination is not limited to the scope of the direct examination. *Id.* However, to be relevant, the proffered evidence must have a logical or rational connection with the fact sought to be provided. *State v. Williamson*, 84 Wis.2d 370, 384-85, 267 N.W.2d 337 (1978). There must be a reasonable relation between the evidence sought to be introduced and the proposition to be proved before the cross-examination will be allowed. Rogers, 93 Wis.2d at 691, 287 N.W.2d 774.

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credibility, other than conviction of crimes as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

We previously have noted that evidentiary determinations are a matter of trial court discretion. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983); *Rogers*, 93 Wis.2d at 689, 287 N.W.2d 774. This discretion of the trial court is broad. *State v. Oberlander*, 149 Wis.2d 132, 140, 438 N.W.2d 580 (1989). The appellate court should reverse a trial court's determination to limit or prohibit a certain area of cross-examination offered to show bias only if the trial court's determination represents a prejudicial abuse of discretion. *Williamson*, 84 Wis.2d at 384-85, 267 N.W.2d 337); *State v. Whiting*, 136 Wis.2d 400, 422, 402 N.W.2d 723 (Ct.App.1987). In *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981), this court stated:

> It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

See also Oberlander, 149 Wis.2d at 140-41, 438 N.W.2d 580. No abuse of discretion will be found if a reasonable basis exists for the circuit court's determination. *Oberlander*, 149 Wis.2d at 141, 438 N.W.2d 580.

We hold that the trial court did not abuse its discretion in determining that the proffered evidence was not relevant to show bias, motive or interest or more generally the character or credibility of Dr. Roberts as an expert witness. The court of appeals erred in substituting its discretion for that of the trial court.

In reaching its decision, the court of appeals concluded Lindh should have been allowed to cross-examine

Dr. Roberts "as to the fact that allegations of misconduct were pending against him and the serious effect upon his profession and livelihood if he were convicted of the charges alleged" and that Lindh should have been allowed to inquire "whether, during the period in question, he was investigated with respect to possible criminal conduct which, upon conviction, would have serious professional and personal consequences." This conclusion ignores the fact that the trial court had a reasonable basis to conclude that the proffered evidence simply was not in any way relevant.

From the time Dr. Roberts first interviewed Lindh in the hospital on January 15, 1988, through the times that he interviewed him in June 1988 and August 1988 and up through and including September 1988, there is no evidence in the record that a criminal investigation was being conducted – or, indeed, that one ever was conducted – regarding any allegations against Dr. Roberts. At most, it is known that the matter of the complaints by Dr. Roberts' patients against him was referred to the Dane county district attorney's office in June and that the matter was immediately transferred to the Milwaukee county district attorney's office for any investigation it would choose to pursue and any prosecution it would choose to conduct. There is no evidence that after that time and as of the time of trial, the Milwaukee county district attorney's office ever began any criminal investigation.[11]

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[11] An investigation of Dr. Roberts eventually was undertaken by the special prosecutor who brought charges against Dr. Roberts. Dr. Roberts pleaded no contest to these

Clearly, up until July 8, 1988, there was no reasonable possibility for bias, motive or interest on the part of Dr. Roberts because until that date he did not know that any allegations had been referred to the Dane county district attorney's office. Because Dr. Roberts became aware of the immediate transfer of the matter to the special prosecutor at the same time, he had no reason to believe after July 8, 1988, that the Dane county district attorney's office would be in a position to prosecute him and thus possibly favor him in exchange for his testimony. Dane county was not in a position to make any "deals," reduce any charges, or even make any recommendation as to any criminal investigation or prosecution against Dr. Roberts and Dr. Roberts knew it. He therefore had no reason to favor the prosecutor in the instant case by testifying or giving a report favorable to him.

The relationship between the Dane county district attorney's office and Dr. Roberts which would be necessary to suggest bias, interest or motive simply did not exist. The disclosure provided by the prosecutor upon the request of the defense and the *voir dire* of Dr. Roberts unequivocally showed the same thing. There is no reason whatsoever to conclude that there was fertile ground for even the seed of a "deal" to be sewn and to germinate under these circumstances. To suggest that Dr. Roberts' testimony would be influenced in favor of the prosecution under these circumstances amounts to mere speculation. There being no nexus between the future criminal

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charges. Although the record does not indicate the exact dates of these events, it is clear that they all occurred subsequent to Dr. Roberts' testimony at phase II of Lindh's trial.

investigation and prosecution of Dr. Roberts, if any were to be undertaken, and the Dane county district attorney's office, a jury could not reasonably find a logical connection between the two, because none existed. Thus, it was not an abuse of discretion not to allow the matter to be brought up on cross-examination.

Analogous decisions from other jurisdictions support our conclusion. In *Gutierrez v. State*, 681 S.W.2d 698, 706-07 (Tex.Ct.App.1984), the court held it was not an abuse of discretion to prohibit cross-examination of a state witness on pending charges under circumstances where the county attorney, not the district attorney prosecuting the defendant's case, had authority over the witness's pending charges; no deals had been made with the witness; nobody in the district attorney's office had suggested lenient treatment and there was no evidence elicited at the *voir dire* of the witness which suggested he had a self-interest in his testimony.

Similarly, in *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985) (en banc), the court held that it was not unreasonable to refuse to allow the defendant to cross-examine a state witness on a pending contempt charge. The county attorney prosecuting the case in which the witness was to testify was not involved in the pending contempt charge. A special, independent prosecutor had full responsibility for the contempt charges. Thus, the court held that the pending charge "would not have indicated that [the witness's] testimony was colored by any hope of lenient treatment from the County Attorney." 145 Ariz. at 533, 703 P.2d at 477.

These cases stand for the proposition that, where a witness is himself subject to a prosecution by those who are separate and distinct from those who have called him as a witness, there is no reasonable basis to believe the witness has a motive to curry favor or hope for leniency by virtue of his testimony. This clearly is the situation in the instant case. Because of the fact that any prosecution by the special prosecutor against Dr. Roberts at some point in the future was merely a possibility, there was no reasonable basis to believe that Dr. Roberts would color his report or testify to some sort of bias, motive or interest. As courts have indicated, cross-examination for bias is not opportune when there exists the mere possibility of future or potential charges. *See generally, State v. Grasso*, 172 Conn. 298, 374 A.2d 239, 242 (1977); *People v. Simmons*, 99 Ill.App.3d 519, 54 Ill.Dec. 951, 955, 425 N.E.2d 1168, 1172 (1981). It is not even the case that, as a psychiatric professional, Dr. Roberts was called upon to "rise above" influences that might lead to bias, motive or interest on his part, for no such influences ever existed.

The cases upon which Lindh relies in this regard[12] stand in sharp contrast to the situation in the case at bar, although the defendant presents them for the broad proposition that a witness may be cross-examined about the threat of criminal prosecution and not just about pending charges. In the cases offered by Lindh, the evidence had a

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[12] Lindh relies upon *Cowheard v. State*, 365 So.2d 191 (Fla.Dist.Ct.App.1978); *State v. Chesnut*, 621 P.2d 1228 (Utah 1980); *United States v. Hitchmon*, 609 F.2d 1098 (5th Cir.1979); *Burr v. Sullivan*, 618 F.2d 583 (9th Cir.1980); *United States v. Onori*, 535 F.2d 938 (5th Cir.1976); and *Greene v. Wainwright*, 634 F.2d 272 (5th Cir.1981).

direct and immediate nexus to bias, motive to testify falsely or motive to favor the prosecution. The cases involved actual or pending criminal charges or a direct and immediate ongoing criminal investigation or imminent threat of criminal charges by a government agent directly involved in the case in which the witness was to testify. In the case at bar, there were no pending criminal charges. There was no ongoing criminal investigation. If a criminal investigation were undertaken and charges were brought in the future, those charges would be brought by the special prosecutor, not by the Dane county district attorney's office.

Certain cases cited by Lindh generally evidence what the United States Supreme Court in *Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, called a "prototypical form of bias." In Van Arsdall, the trial court prohibited any cross-examination on the fact that the state had dropped a public drunkenness charge, actually filed, in exchange for the witness's promise to speak with the prosecutor about a murder. The Supreme Court held that the total prohibition of all inquiry into this "prototypical form of bias" violated the defendant's constitutional right of confrontation by "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* at 679-80, 106 S.Ct. at 1435.

Although *Van Arsdall* did not specifically define "prototypical form of bias," the context of the case makes it clear that the court was referring to a situation in which a witness might have or realistically perceive an interest in testifying so as to favor the prosecution. For example, in

Van Arsdall, the witness was in a position to and actually did testify in exchange for reduction in charges or sentence.

Other cases cited as persuasive by Lindh manifest a comparable prototypical form of bias. In *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974), the juvenile witness was on probation and thus distinctly "vulnerable," as the Supreme Court described it, to influences which might raise questions of biases, ulterior motives and prejudices that "relate directly to issues or personalities in the case at hand." Specifically, because of his probationary status, the witness might have been effectively encouraged to make a faulty initial identification of the defendant in order to shift suspicion away from himself as to the same incident, and he also might have been subject to undue pressure from the police and made his initial identifications under fear of possible probation revocation. *Id.* at 311, 317, 94 S.Ct. at 1107, 1111. This in turn could have affected his later in-court identification. *Id.* at 317, 94 S.Ct. at 1111.[13]

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[13] In this regard, the United States Supreme Court noted that " '[a] *partiality* of mind at some former time may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying.' " *Id.* n. 5 (Emphasis in original). While the defendant in the case at bar might have attempted to use this statement to argue that Dr. Roberts might have had a meaningful "partiality of mind at some former time" comparable to that envisaged by the Supreme Court in Davis, such an argument would be a manifestly unreasonable one. There is absolutely nothing in the record to suggest any reasonable possibility that Dr. Roberts ever held any bias, motive or interest that conceivably might have affected his testimony.

There was also a prototypical form of bias evident in *State v. Lenarchick*, 74 Wis.2d 425, 247 N.W.2d 80 (1976), where charges were pending against the witness. Prior to trial, one charge was dropped and two charges against the witness were being held open. Addressing the problem as one of constitutional dimension, the court said that:

> When a witness has been criminally charged by the state, he is subject to the coercive power of the state and can also be the object of its leniency. The witness is aware of that fact, and it may well influence his testimony.

Id. at 447-48, 247 N.W.2d 80. Under such circumstances, this court held, "[a] defendant, as an ingredient of meaningful cross-examination, must have the right to explore the subjective motives for the witness' testimony." *Id.* at 448, 247 N.W.2d 80.

In *State v. Balistreri*, 106 Wis.2d 741, 317 N.W.2d 493 (1982), a prototypical form of bias was effectively accorded proper exposure at trial. The witness had been arrested for criminal acts resulting in plea negotiations which reduced the witness's potential sentence from 105 to 40 years. In ruling that the trial court properly excluded testimony as to the factual details of prior criminal acts of the witness, the nature and number of which were already made known to the jury by the witness on direct examination, the court said that:

> 'The main objective [of allowing cross-examination pertaining to a witness' criminal acts and plea negotiations] is to show that the witness may have expected leniency or immunity from prosecution if he gave testimony in favor of the state, and it is necessary to show the commission of wrongful acts in order to establish the basis for such an expectation.'

Id. at 753, 317 N.W.2d 493, *quoting Lenarchick*, 74 Wis.2d at 447, 247 N.W.2d 80. Thus, while the cross-examination properly could have included inquiry into the general existence of the plea negotiations and the criminal acts to which the negotiations were related, such was not the case with respect to the factual details of the prior criminal acts of the witness in *Balistreri*, because they would not show that the witness may have expected leniency or immunity in exchange for his testimony.

In cases where there exists a prototypical form of bias, the possibility of bias, motive and interest of the witness is particularly distinct and immediate. The witness has an ongoing, dual relationship with the prosecutory actors. On the one hand, the witness as such is being of some service to the prosecution by giving his testimony; on the other hand, his status with respect to the same prosecution is "vulnerable." Criminal process of some sort against the witness, even if only at its initial stages, is a reality. Usually, it is being carried out by the prosecuting attorneys who are depending on his service as a witness; at the very least, it is being carried out in the same jurisdiction as the one in which the witness is offering his testimony. Under such circumstances, there usually is a reasonable inference that the witness is or considers himself to be in a position of being effectively more or less "vulnerable" to factors that could influence his testimony. The witness's acts, relationship or situation with respect to the state might be likely to produce at least a strong suspicion of bias, motive and intent in the

eyes of a jury. A jury might reasonably have found the evidence "furnished the witness a motive for favoring the prosecution in his testimony." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435.

Lindh does not expose a "prototypical form of bias." Here, the prosecution had not dropped any pending criminal charges against Dr. Roberts, no charges had been reduced or favorably disposed, and Dr. Roberts was not on parole or probation or in custody. There was only the possibility that allegations of sexual misconduct with patients could form the basis of criminal charges. There is not even any claim that a criminal investigation was actually being conducted. Because substantial steps were taken immediately by the Dane county district attorney's office to appoint the special prosecutor upon the referral of the investigation of Dr. Roberts to the district attorney's office, Dr. Roberts had no "prototypical" bias, interest or motive to curry favor with the Dane county district attorney's office which was prosecuting Lindh, because any charges that would be brought against Roberts would be brought by the special prosecutor.

Although the basis of Lindh's other theory of relevancy is not altogether clear, it appears to proceed from a view that the exclusion of the proffered evidence is error because, as he describes it, the state was allowed to present Dr. Roberts as if his character was "pure as the driven snow." Noting that, at the start of his testimony, Dr. Roberts introduced himself as a grandfather, a faculty member at a theological seminary, the chairperson of conferences on religion and mental health, and as recipient of an award essentially naming him "midwest psychiatrist of the year," Lindh apparently argues that the

mention of such facts in front of the jury entitled him to the particular cross-examination of Dr. Roberts that he desired. Again, we find that the trial court did not abuse its discretion in finding the proffered evidence "irrelevant and immaterial."

The character of a witness may be impeached only in regard to matters which go directly to his reputation for truth and veracity. *Barren v. State*, 55 Wis.2d 460, 461-66, 198 N.W.2d 345 (1972). We have long considered that on cross-examination into the character of a witness, use of irrelevancies, insinuating that a person is of bad moral character, tending to degrade him in the eyes of the jury, is not a proper impeachment device. *Banas v. State*, 34 Wis.2d 468, 474, 149 N.W.2d 571, *cert. denied* 389 U.S. 962, 88 S.Ct. 346, 19 L.Ed.2d 373 (1967). Virtually by definition, such evidence is not relevant, tending only to prejudice the jury against the witness.

The fact that Dr. Roberts may have engaged in professional misconduct and may have been subject to disciplinary measures as a result would not tend to make more or less likely the accuracy and correctness of his diagnosis and professional opinion in this case. The proffered evidence does not have any reasonable tendency to show Dr. Roberts was less qualified to examine and diagnose Lindh and render an opinion as to Lindh's mental capacity and no reasonable jury could so find. Nor would the cross-examination have cast light on Dr. Roberts' character for truthfulness and untruthfulness. The subjects that Lindh wished to discuss on cross-examination were completely unrelated to Dr. Roberts' truthfulness and abilities as an expert witness.

Far from presenting himself as "pure as the driven snow," as the defense asserts he did, Dr. Roberts simply testified to his past experience and professional background, as do all expert witnesses. The fact that he offered certain innocuous family information without objection from the defendant does not mean that Lindh had a right to cross-examine on the matter of the sexual misconduct allegations.

Dr. Roberts' introduction was qualitatively no different from that of defense psychiatric expert Dr. Griffith, who testified he was: acting director of Connecticut Mental Health Center in New Haven, Connecticut, and was associate professor of psychiatry at Yale University School of Medicine and an associate professor in the Department of Afro-American studies at Yale. Dr. Griffith also testified that he went to Harvard University, took his medical degree at University of Strasburg in France, did residency at the Albert Einstein College of Medicine in New York, that he has a specialty certification in psychiatry and forensic psychiatry, that he teaches a course in the department of Afro-American studies that has to do with the psychological dimensions of black autobiographies, that he is a consultant to the Pan American National Health Organization, Project Hope, and the Commission of Security and Cooperation in Europe of the United States Congress, that he is editor of Black Psychiatrists of Americans Quarterly, that he is on the executive committee of the Black Psychiatrists of America, that he was honored by a fellowship of American Psychiatric Association and received a traveling fellowship from the Solomon Fuller Institute, that he serves on various boards, and that he has authored a number of articles.

Numerous cases have held that allegations of professional wrongdoing, misconduct or negligence that is unrelated to the case on trial is not a proper subject of impeachment of an expert medical witness. In *State v. Paradise*, 213 Conn. 388, 567 A.2d 1221, 1229-30 (1990), inquiry on cross-examination into a prior investigation of official misconduct by the witness in his prior position as chief medical examiner of New York City would have been of dubious relevance and, moreover, would have led to a mini-trial on the circumstances of unrelated cases. In *Downey v. Weston*, 451 Pa. 259, 301 A.2d 635, 639 (1973), the court held that it was not an abuse of discretion or an error of law for the court to bar cross-examination of a medical expert witness to establish that he had misconducted himself by failing to observe a principle of medical ethics. In *Noble v. Lansche*, 735 S.W.2d 63 (Mo.Ct.App.1987), it was held reversible error for the trial court to allow an expert witness in a medical malpractice case to be cross-examined on his voluntary surrender of his license to dispense controlled narcotics, due to his own drug problem. The court held the expert's former drug problem was unrelated to his skill, knowledge and qualifications to express an expert opinion in the case; neither the drug abuse nor the surrender of his license affected his qualification as an expert witness or his credibility. The only purpose of such evidence could be to cause disparagement over the expert's testimony by reason of irrelevant misconduct.

See also Schneider v. Revici, 817 F.2d 987 (2d Cir.1987) (fact that an expert witness's license has been temporarily suspended pending an investigation); *Downey v. Weston*, 451 Pa. 259, 301 A.2d 635 (1973) (expert's failure to

observe a principle of medical ethics); *Sanchez v. Bay General Hospital*, 116 Cal.App.3d 776, 172 Cal.Rptr. 342 (1981) (question why doctor did not have privileges at certain hospitals); *Miceikis v. Field*, 37 Ill.App.3d 763, 347 N.E.2d 320 (1976) (prior malpractice litigation); *see also Pyle v. Morrison*, 716 S.W.2d 930 (Tenn.Ct.App.1986).

The trial court, even after finding the proffered evidence irrelevant, went on to assume, apparently for the sake of argument, that the evidence was relevant, analyzing the problem pursuant to sec. 904.03, Stats.[14] It then

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[14] Apparently because in conducting this balancing test the trial court did not explicitly refer to sec. 904.03, Stats., and did not expressly state that it would engage in "balancing," Lindh has suggested that the trial court failed to exercise its discretion. Because a trial court's failure to exercise discretion constitutes an outright abuse of discretion, *State v. Hutnik*, 39 Wis.2d 754, 764, 159 N.W.2d 733 (1968), we would reverse the trial court if Lindh's argument were meritorious. However, we find that it is not meritorious.

The fact that the trial court did not expressly state the name of sec. 904.03, Stats., or use the words "weighing" or "balancing" or some similar word or words to describe its analysis, does not mean, that the court failed to exercise its discretion. We do not recognize such a "magic words" argument.

If anything, a trial court's failure to generally refer to its sec. 904.03, Stats., balancing tests might under certain circumstances constitute a "fail[ure] to set forth its reasoning." *See Pharr*, 115 Wis.2d at 343, 340 N.W.2d 498. Where the trial court does not "set forth its reasoning" for its decision regarding the admission of evidence, we must search the record for a reasonable basis for the decision. *Id.* We will not find an abuse of discretion if any reasonable basis exists for the decision. *Id.* at 342, 340 N.W.2d 498. The fact that a trial court does not expressly balance the probative value of the evidence against the risk of unfair

found that any relevance was outweighed by the risk of unfair prejudice from admission of the evidence. We find that the trial court was well within its discretion in that finding. Even if the proffered evidence could be considered marginally relevant to bias, motive or interest or to the character or credibility of Dr. Roberts as an expert, it was reasonable to conclude that the risk of unfair prejudice from admission of the evidence far outweighed the probative value of the evidence, and the cross-examination could have been properly prohibited for that reason.

As the Supreme Court said in *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435, bias evidence which is only marginally relevant or which may confuse the issues is excludable. As stated in *Williamson*, 84 Wis.2d at 384-85, 267 N.W.2d 337, evidence which is relevant to provide bias, like evidence offered to prove other facts, "must also satisfy sec. 904.03, Stats., requiring the trial court to weigh the probative effect of the evidence against its prejudicial effect." *See also, United States v. Abel*, 469 U.S. 45, 54-55, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984).

> Evidence is unfairly prejudicial if it has a 'tendency to influence the outcome by improper means' or it is 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish' or otherwise causes a jury 'to base its

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prejudice does not relieve the appellate court of its obligation to do so, if the result would be to sustain the judgment or order.

As for the trial court's actual application of the balancing test in this case, we consider the trial court to have sufficiently set forth its reasoning, *e.g.*, by noting the prejudicial effects that the jury might think "where there is smoke, there's fire."

> decision on something other than the established propositions of the case.' *See Christensen v. Economy Fire & Cas. Co.*, 77 Wis.2d 50, 61, 61 n. 11, 252 N.W.2d 81 (1977).

Lease America Corp. v. Ins. Co. of N. America, 88 Wis.2d 395, 401, 276 N.W.2d 767 (1979).

Other courts have delineated some of the prejudice factors which may warrant the exclusion of bias evidence. One factor is whether the evidence would divert the trial to an extraneous issue. *Hossman v. State*, 467 N.E.2d 416, 418 (Ind.1984). A court can and should exclude bias evidence which has little bearing on the witness's credibility, but which would impugn the witness's character because such evidence "opens the door to improper considerations and lends to the confusion of the jury by placing undue emphasis on collateral matters." *People v. Cole*, 654 P.2d 830, 833 (Colo.1982). If the bias evidence, taken as a whole, might have directed the jury's attention away from the case under consideration, it may be prejudicial. *Id.* at 834.

The trial court may exclude bias evidence if the very slight probative value of the evidence on the issue of bias fails to overcome its strong likelihood of confusion of the issues and undue delay. *United States v. Jarabek*, 726 F.2d 889, 902 (1st Cir.1984). The appellate court should not find the trial court abused its discretion when the relevance of the proffered bias evidence was unclear and the risk of prejudice was real. *United States v. Sellers*, 658 F.2d 230, 232 (4th Cir.1981). The trial court may prohibit cross-examination in a certain area where to permit it would open up extraneous matters, for the trial court " 'has responsibility for seeing that the sideshow does not take

over the circus.' " *United States v. Brown*, 547 F.2d 438, 446 (8th Cir.1977).

In the instant case, the risk of unfair prejudice was great. Allegations of sexual misconduct with patients against a psychiatrist have great potential to unduly prejudice the jury against the witness. Cross-examination on this matter would have distracted the jury from the real issues in the case and would have caused the jury to speculate about unproven charges against the witness. A mini-trial on Dr. Roberts' conduct could have ensued.

The trial court clearly did not abuse its discretion in finding that any relevance of the proffered evidence was outweighed by other factors. Pointing out that the allegations against Dr. Roberts were nothing more than allegations and there was a risk that the jury would think that "if there's smoke, there's fire," the trial court accurately focused on what would have amounted to an unfairly prejudicial admission.

Moreover, in reviewing the trial court's ruling, the appellate court should conclude that the trial court relied on the considerations expressed by the prosecutor as grounds for the court's ruling, where the court obviously acquiesced in the prosecutor's explanation, but did not expressly articulate all of its reasoning itself. *See Hagenkord v. State*, 100 Wis.2d 452, 464, 302 N.W.2d 421 (1981). In this regard, although we do not consider the trial court to have "acquiesced" as such, we note that in arguing to prohibit the cross-examination, the prosecutor specifically argued that cross-examination about the pending allegations of sexual misconduct with patients would serve no purpose except to "trash" Dr. Roberts, that it

would distract the jury from the real issue, the mental responsibility of Lindh, and that it would cause the jury to speculate about an unrelated issue. These are traditional grounds of prejudice under sec. 904.03, Stats.

We hold that the trial court did not abuse its discretion or otherwise err insofar as it concluded that any relevance of the proffered evidence was outweighed by other considerations, including the risk of unfair prejudice, such that it was not improper to exclude the evidence.

We now turn to the second issue, in which Lindh argues that the trial court erred in refusing to suppress the use of statements taken by Dr. Roberts within hours of Lindh's arrest. Lindh argues that the right against self-incrimination applies to phase II of a trial and that his rights under *Miranda* were not honored.

The Fifth Amendment to the United States Constitution and Article I, sec. 8 of the Wisconsin Constitution guarantee a defendant a right against self-incrimination. Lindh specifically contends that Miranda applied in his case insofar as Dr. Roberts conducted his first interview with him at the hospital on the night of the crimes, before the defendant had interposed an insanity defense and before Roberts had officially been appointed as one of the state's experts. Lindh makes this assertion despite the fact that his statements to Dr. Roberts were admitted only at the insanity phase of the trial, only on the issue of Lindh's mental responsibility, only after Lindh interposed an insanity defense and only after he presented expert opinion evidence in support of that defense.

We note as a general matter that the constitution does not apply to prohibit the admission of testimony of a state psychiatric expert in circumstances where the defendant already has interposed an insanity defense and has presented expert testimony in support of that defense. *See Buchanan v. Kentucky*, 483 U.S. 402, 421-22, 107 S.Ct. 2906, 2916-17, 97 L.Ed.2d 336 (1987); *Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989); *United States v. Byers*, 740 F.2d 1104, 1110-11 (D.C.Cir.1984); *Riles v. McCotter*, 799 F.2d 947, 953 (5th Cir.1986); *Schneider v. Lynaugh*, 835 F.2d 570, 575-76 (5th Cir.1988); *Granviel v. Lynaugh*, 881 F.2d 185, 190 (5th Cir.1989); *State v. Hope*, 96 N.C.App. 498, 386 S.E.2d 224 (1989); *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989).

Lindh relies upon *United States v. Hinckley*, 672 F.2d 115 (D.C.Cir.1982) and *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984) to support his contention that the right against self-incrimination applies to phase II of a trial. Both cases are clearly distinguishable. In *Hinckley*, F.B.I. agents continued to interrogate the defendant after he requested an attorney and after the defendant said he wanted the interview stopped. The government argued it should at least be allowed to use the defendant's statements and psychiatric opinion evidence based on the police reports of the interview to rebut the defendant's insanity defense. The court held evidence gleaned from the police officer's egregious violation of the defendant's *Miranda* rights could not be used, even for this limited insanity rebuttal purpose, because exclusion was necessary to curtail such misconduct. *Hinckley*, 672 F.2d at 133-34. In *Cape v. Francis*, the court held an expert's opinion that the defendant was sane and criminally responsible could not be

admitted at phase I of the case. Moreover, the expert's opinion was based upon the defendant's unwarned statements made during a court-ordered psychiatric exam, and the defendant never raised the insanity defense.

Lindh also relies, unpersuasively, upon *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987), which involved a police interview and not a psychiatric interview. The question of whether the fifth amendment applied to the insanity issue was not considered. Finally, Lindh relies on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In *Estelle*, the trial court had *sua sponte* appointed a psychiatrist to examine the defendant and determine his competency. After the defendant was found guilty, the state used the psychiatrist's opinion as evidence of the defendant's future dangerousness at the penalty phase of the trial, where the state had the burden of proving future dangerousness in order to secure the death penalty. At the competency hearing, the psychiatrist had not informed the defendant that he had the right to remain silent and he had given the defendant no indication that the court-ordered examination would be used to gather information necessary to decide whether he would receive the death penalty. The court held that under "these distinct circumstances," the defendant's fifth amendment privilege against self-incrimination was violated. *Id.* at 466, 101 S.Ct. at 1875.

By its own terms, *Estelle* is limited to its facts. In fact, the Supreme Court in *Estelle* clearly appears to have exempted from its holding a situation such as in the instant case, indicating that a defendant who asserts the insanity defense and introduces supporting psychiatric evidence cannot also preclude the state from conducting

an examination and introducing the product of that examination. *Estelle*, 451 U.S. at 468, 101 S.Ct. at 1875.

In *Estelle*, the defendant made his statements unwittingly, unknowing that the state would use them to secure the death penalty, on which issue it had the burden of proof beyond a reasonable doubt. In contrast, in the instant case, the defendant made his statements knowingly. More important, he had the burden of proof, and the evidence from the interview was only used for the purpose of rebutting the defendant's insanity argument. The state was not using the "simple, cruel expedient" of forcing evidence from the defendant's own lips to meet its burden of proof. *Id.* at 462, 101 S.Ct. at 1872, quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-82, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961).

We focus on the nature and purpose of the examination and not on its timing. The fact that Dr. Roberts conducted his interview before and not after Lindh interposed his insanity defense would not appear relevant in this regard. There are valid legal and policy reasons for this focus.

A psychiatric interview designed to ascertain a defendant's mental responsibility, evidence of which is not admitted until phase II of trial, is not accusatory in nature. It looks at the past conduct of which the interviewer was already aware. We consider that *Miranda* warnings, which are aimed against involuntary self-incrimination, are a prerequisite neither to such an interview nor to admission of the results of the interview at phase II. *Cf. State v. Knapp*, 111 Wis.2d 380, 388, 330

N.W.2d 242 (Ct.App.1983); *State v. Heffran*, 129 Wis.2d 156, 165-66, 384 N.W.2d 351 (1986).

Complete information is essential on the insanity defense, and the best information comes from an expert examination of the defendant himself. To the extent official misconduct needs to be deterred, sufficient deterrence is adequately provided by excluding the evidence from the guilt phase. The great importance and reliability of the defendant's own statements on this issue should not be undercut by any incremental benefits to be gained by suppression. Reliability of the fact-finding process would be decreased by application of the constitutional privilege. *Cf. Allen v. Illinois*, 478 U.S. 364, 374-75, 106 S.Ct. 2988, 2994-95, 92 L.Ed.2d 296 (1986). Admission of the results of a state psychiatric examination of a defendant who raises the insanity defense does not tarnish or diminish the "noble aspirations" and "fundamental values" underlying the privilege against self-incrimination. *See generally Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964).

We thus hold that the constitutional privilege against self-incrimination does not require the exclusion of results of a psychiatric interview with the defendant from phase II of a trial on the grounds that the psychiatrist did not comply with the dictates of *Miranda*.

Assuming, *arguendo*, that *Miranda* is applicable in the case at bar, we will consider Lindh's argument that Dr. Roberts failed to scrupulously honor his purported assertion of his right to remain silent when he indicated he did not want to discuss the details of the shootings.

A defendant's exercise of his right to silence must be "scrupulously honored," *State v. Hartwig*, 123 Wis.2d 278, 284, 366 N.W.2d 866 (1985), citing *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence. *Id.*

These principles notwithstanding, it is clear that Lindh never exercised or invoked his right to silence during his interview with Dr. Roberts on the day of the shooting. Lindh did not assert that he did not want to talk with Dr. Roberts. Never did he say that he did not want to answer additional questions. He did not ask Dr. Roberts to end the interview or to go away. He said only that he did not want to discuss the details of the shootings. That, standing alone, is not an invocation of the right to silence. *See e.g., State v. Koput*, 134 Wis.2d 195, 202, 396 N.W.2d 773 (Ct.App.1986), *rev'd on other grounds*, 142 Wis.2d 370, 418 N.W.2d 804 (1988); *People v. Galimanis*, 765 P.2d 644 (Colo.Ct.App.1988), *cert. granted*, 783 P.2d 838 (Colo.1989); *People v. Brockington*, 126 A.D.2d 655, 511 N.Y.S.2d 84, 86 (1987).

We conclude that, even if Lindh arguably did invoke his right to remain silent, Dr. Roberts scrupulously honored that right. Whether the questioner used "improper persuasive tactics" or "overbearing or coercive tactics" is determinative. *State v. Turner*, 136 Wis.2d 333, 357-60, 401 N.W.2d 827 (1987). Here, such tactics were not used.

Thus, we hold that the trial court did not abuse its discretion or otherwise err either in excluding the evidence proffered by Lindh on cross-examination or in

admitting the testimony of Dr. Roberts pertaining to his interview of Lindh on the evening of the shootings. Because of our holdings in this case, we need not consider the question of harmless error with respect to either issue.

The decision of the court of appeals is reversed.

BABLITCH, J., withdrew from participation.

SHIRLEY S. ABRAHAMSON, Justice (dissenting).

I agree with the unanimous decision of the court of appeals that the circuit court committed prejudicial error in completely barring the defendant from cross-examining the psychiatrist-witness about a pending investigation into the witness's alleged criminal misconduct to show bias.[1]

The majority opinion holds that the test to determine whether defense counsel may cross-examine a state's witness about alleged criminal misconduct to show the witness's bias is whether a jury could find a "logical connection" between the criminal investigation of the witness and the district attorney's office on whose behalf the witness was testifying. The majority then concludes

[1] Cross-examination directed toward revealing biases, prejudices, or ulterior motives of a witness – that is, an interest of the witness that may relate directly to issues or personalities in the case at hand – is a particular attack on the credibility of the witness. The proper standard for the test of relevancy in cross-examination is whether the evidence will be useful to the jury in appraising the credibility of the witness. *Rogers v. State*, 93 Wis.2d 682, 689, 287 N.W.2d 774 (1980).

that the circuit court did not err in excluding the evidence, because "the relationship between the Dane county district attorney's office and [the witness] which would be necessary to suggest bias, interest or motive simply did not exist." Majority op. at 177.[2]

This test does not conform to the test set forth in earlier cases. This court and the United States Supreme Court have concluded that "a defendant, as an ingredient of meaningful cross-examination, must have the right to explore the subjective motives for the witness' testimony."[3] Evidence is relevant to the issue of bias in this

[2] The majority asserts that there was no evidence of any investigation of Dr. Roberts during the pendency of the defendant's case. Majority op. at 178. I believe that for the purposes of this appeal, the fact that allegations of professional misconduct by Dr. Roberts had been referred to a special prosecutor is sufficient evidence that some kind of investigation would follow.

[3] *State v. Lenarchick*, 74 Wis.2d 425, 448, 247 N.W.2d 80 (1976) (Emphasis added).

> According to the United States Supreme Court, evidence relating to bias on cross-examination is relevant if a jury might reasonably find that the evidence "furnished the [state's] witness a motive for favoring the prosecution in his testimony." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).
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> The circuit court must recognize that a jury need not accept the witness's denial about bias. Cross-examination should be permitted "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974).

case if it tends to prove that the witness believed that he might be aided or harmed by testifying in a particular way. The focus of the circuit court's inquiry should be on the witness's state of mind.

Because I believe the majority opinion uses an incorrect standard and reaches an incorrect decision, I dissent.

I.

I believe that the circuit court in this case had to apply the following analysis to determine the relevance of evidence proffered on cross-examination to show a witness's bias: Does the proposed cross-examination support a reasonable inference that the witness believed he might benefit if he testified in favor of the state's position, or he might be disadvantaged if he testified against the state's position?

The party asserting bias need not prove that the witness received promises from the state or would in fact benefit from or be harmed by giving certain testimony. It is enough if the witness believes he or she has a self-interest in the testimony.[4]

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[4] In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), for example, the Supreme Court held that it was error to bar evidence on cross-examination that a state witness was on juvenile probation. The adverse party asserting bias in that case wished to show that the witness may have feared that his probation would be revoked and feared that he might be a suspect in the investigation. There was no suggestion that actual threats of revocation of probation had been made to the witness or that the witness was a suspect.

Even if the witness's beliefs were "absurd," the adverse party has a right and a duty to explore the witness's motives. We explained this obligation in *State v. Lenarchick*, 74 Wis.2d 425, 447, 247 N.W.2d 80 (1976), as follows:

> Although no promises had been made to [the witness], he may well have been testifying favorably to the state in the hope and expectation that the state would reward him by dropping or reducing pending charges. Even though that expectation were absurd, defense counsel had the right and duty to explore the witness' motives.

I conclude that the majority opinion mistakenly adopts a new test to determine the relevance of evidence to show a witness's bias that deviates from the test this court and the United States Supreme Court have established.

II.

Applying the test this court and the United States Supreme Court have used to determine the relevance of evidence proffered to show bias, I conclude that the circuit court erred in barring cross-examination on the issue of bias in this case.

In reviewing the circuit court's decision about the scope of cross-examination to show bias, an appellate court must consider (1) that an adverse party is allowed

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See also State v. Balistreri, 106 Wis.2d 741, 753, 317 N.W.2d 493 (1982).

great latitude regarding the subject and scope of the inquiry to show bias; (2) that the determination of the relevancy of the line of questioning proffered to establish bias is within the discretion of the circuit court;[5] and (3) that it is error for a circuit court to bar an accused from presenting all facts from which a jury might reasonably infer bias of a prosecution witness.[6]

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[5] In *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981), the court stated the method for reviewing a circuit court's discretionary determination:

> A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning. The record here demonstrates beyond doubt that the trial court in this case failed to articulate and use the discretionary standards which the legislature has set as guidelines for determining an award of maintenance and failed to set forth the facts upon which it relied.

[6] *State v. Lenarchick*, 74 Wis.2d 425, 446-448, 247 N.W.2d 80 (1976).

The circuit court in this case determined that the evidence proffered was "totally irrelevant and immaterial" to the issues of motive, interest or bias.[7] The state argues that on a sliding scale of possible bias, the defendant's theory of bias in this case is too weak to allow the defendant to cross-examine on this subject.

Both the majority opinion and the circuit court apparently base their determination of lack of relevance on two factors and reason as follows:

1. Dr. Roberts learned two facts simultaneously. He learned that the state might investigate allegations of criminal conduct his patients made against him. He also learned that a special prosecutor unconnected with the Dane County district attorney's office would be in charge of the matter. Knowing that the Dane County district attorney was prosecuting the defendant in this case and another district attorney's office was in charge of a possible investigation of him for criminal charges, Dr. Roberts could not possibly think that his testimony benefitting the Dane County district attorney's case against the defendant could influence the outcome of his own potential criminal case.

2. Criminal charges were not filed against Dr. Roberts during the pendency of the defendant's case. Thus during the pendency of the defendant's case,

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[7] The circuit court stated: "And I think it's fair to say that, no matter what [Dr. Roberts does] for the Dane County district attorney's office, [Dr. Roberts] would not be able to influence any result, as a result of [the special prosecutor's] investigation or any judge that might ultimately hear it, should there be any charges filed."

because any prosecution of Dr. Roberts was "merely a possibility, there was no reasonable basis to believe that Dr. Roberts would color his report. . . . " or testimony. Majority op. at 178. The majority intimates that no bias can be shown unless criminal charges are filed or there is proof of actual negotiation between the witness and the state regarding specific pending charges.

This reasoning is, I believe, flawed. The majority's reliance upon the special prosecutor's being in the Milwaukee County district attorney's office and not in the Dane County district attorney's office lends little support for the majority's conclusion. Even though the circuit court or the majority believes that the presence of two autonomous district attorney offices guarantees that the one would not influence the other, Dr. Roberts might have believed otherwise. Dr. Roberts would know that his testimony in this high profile case would be an open, public record that the special prosecutor might very well hear or read about.

The record shows that Dr. Roberts learned of his expanding difficulties with various authorities after his January interview with the defendant and before he filed his report in August. He learned about investigations by the University Hospital and the State Medical Examining Board and that allegations against him had been referred to the State Justice Department and the district attorney's office. Nothing in the record indicates that Dr. Roberts had formed an opinion regarding the defendant's mental state after the first interview. Indeed, Dr. Roberts interviewed the defendant in June and again in August shortly before trial in September, 1988.

A jury could infer that Dr. Roberts may have felt intensified internal pressure over the entire period to shade his testimony in favor of the state. A jury could infer that Dr. Roberts believed, however unwarranted the belief, that if he testified favorably for the state in the defendant's case, the special prosecutor might be more favorably disposed to drop the investigation; or to investigate the allegations less vigorously; or to show leniency in any charges filed or in a plea agreement or in a recommendation on sentencing.

Neither case law nor logic supports the majority's view that formal charges must be filed before an investigation into criminal behavior is relevant to the issue of bias. The cases stand for the proposition that "when a witness is subject to the coercive power of the state and can also be the object of its leniency" an adverse party must have the opportunity to explore the subjective motives for the witness's testimony. *State v. Lenarchick*, 74 Wis.2d 425, 447-448, 247 N.W.2d 80 (1976).[8]

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[8] See *United States v. Garrett*, 542 F.2d 23 (6th Cir.1976), holding it was abuse of discretion for the trial court to exclude evidence that the government's witness in a drug case had been suspended from the police force because he was suspected for using hard drugs himself and had refused to submit to a urine test. The court of appeals concluded that a jury may have inferred that the witness looked upon a successful prosecution as a means of having his suspension lifted.

See also *State v. Chesnut*, 621 P.2d 1228, 1233 (Utah 1980), *disapproved on other grounds, State v. Crick*, 675 P.2d 527, 531 (Utah 1983) ("the mere possibility of future criminal charges is a sufficient basis to explore the motives of the witness on cross-examination [and to] place his apprehensions thereof before the jury").

That charges had not been filed against Dr. Roberts strengthens rather than weakens the defendant's theory of bias.[9] Dr. Roberts rendered his opinion on the defendant's mental capacity when he did not know what the state would do to him. The jury could reasonably infer that as long as the special prosecutor deferred action on Dr. Roberts's case, Dr. Roberts could hope – even though that hope may have been unrealistic – that he might help his own cause by testifying favorably for the state's position in the defendant's case.

In this case the range of cross-examination to show bias should be even broader than in other cases. In many areas, such as fingerprints, ballistics, and forensic chemistry, expert testimony opinions are formed from "hard" data, knowledge or principles. The opportunity for the expert opinion to be influenced by bias is limited. Psychiatry, in contrast, is a field based largely on "soft" data or knowledge. Under these circumstances the possibility increases that the psychiatrist's findings, opinions, and presentations may be slanted, consciously or unconsciously, by any biases. J. Ziskin and D. Faust, *Coping with Psychiatric and Psychological Testimony* 45 (4th ed. 1988).

I conclude that under the circumstances of this case the circuit court abused its discretion in ruling that the

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[9] The fact that the charges against Dr. Roberts were unproven might be important to the defendants' theory of admissibility based on challenging Dr. Roberts's credibility. Since I conclude that the evidence was admissible to show bias, I do not reach that issue.

evidence of the criminal investigation involving Dr. Roberts was irrelevant to the defendant's theory of bias.[10]

III.

Relevant evidence, of course, may be barred if its probative value is outweighed by unfair prejudice. The circuit court may exclude relevant evidence if it has "a tendency to influence the outcome by improper means." *State v. Baldwin*, 101 Wis.2d 441, 455, 304 N.W.2d 742 (1981). The state argues that unproved allegations of Dr. Roberts's sexual misconduct with patients is a "highly emotionally charged" issue that would distract the jury.

Dr. Roberts's testimony was of great importance to the state. The sole issue in the second phase of the trial was the defendant's mental state. Both the state and the defendant relied on expert witnesses to prove the defendant's mental state. Dr. Roberts was the only expert witness who saw the defendant at the critical time, the day of the offense. The jury's responsibility was to "weigh the opinion of one expert against that of another . . . consider[ing] the relative qualifications and credibility of the expert witnesses." Wis JI-Criminal 200A (Rel. No. 10 – 11/83).[11]

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[10] Because I believe the circuit court abused its discretion in refusing to admit the evidence of bias on cross-examination, I do not reach the defendant's constitutional claim based on the confrontation clause. I note, however, that conforming to the Wisconsin Rules of Evidence may not satisfy constitutional requirements.

[11] The members of the jury are always the "sole judges of the credibility of the witnesses and the weight and credit to be

The evidence of Dr. Roberts's being an object of an investigation for criminal wrongdoing was probative of bias. Any prejudice or distraction caused by giving this information to the jury could have been circumscribed by restricting the scope of the defendant's cross-examination.[12] The nature of the allegations made by Dr. Roberts's patients was irrelevant to the defendant's theory of bias. The relevant information for the jury was the seriousness of the allegations, the referral of the allegations by the hospital to the state for possible criminal prosecution, and the effect on Dr. Roberts's professional career, livelihood, reputation and personal life should he be charged with or convicted of these charges.

Given an adverse party's great latitude regarding the subject and scope of an inquiry to show the witness's bias, the importance of Dr. Roberts's testimony, and the circuit court's power to curtail any undue prejudice to the state by limiting the cross-examination, the circuit court abused its discretion in barring all the proffered evidence, concluding that prejudice to the state outweighed the probative value of the evidence in this case.

IV.

I further conclude that the error barring the evidence was not harmless. Dr. Roberts was the state's primary psychiatric witness. He emphasized in his testimony the

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given to their testimony." Wis JI-Criminal 300 (Rel. No. 25 – 6/90)

[12] The circuit court never considered limiting instructions, because the court ruled the evidence was not relevant.

value of having interviewed the defendant on the day of the shooting – an advantage the other psychiatric witnesses could not claim. Despite the defendant's having the burden of proof on the mental disease or defect issue in the second half of the bifurcated trial, I conclude that prohibition of the bias evidence on cross-examination of Dr. Roberts undermines confidence in the outcome of this case. State v. Dyess, 124 Wis.2d 525, 544-45, 370 N.W.2d 222 (1985).

V.

Finally, I register my disagreement with the majority's conclusion that the *Miranda* rule does not apply to Dr. Roberts's initial interview of the defendant. The United States Supreme Court has not yet decided a case which discusses the application of *Miranda* in situations such as the one presented in this case, namely, where the interview takes place before the accused has been charged or has raised a defense of insanity.[13]

The court should not reach out and decide this issue which is not presented by the facts of the case. The court of appeals correctly determined, I believe, that Dr. Roberts's *Miranda* warnings to the defendant were adequate and that the defendant's rights were honored. Although Dr. Roberts failed to inform the defendant that

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[13] The majority's reliance on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), for its conclusion that *Miranda* does not apply to Dr. Roberts's initial interview of the defendant is misplaced. See Comment, Fifth Amendment Limitations on the Use of Police Testimony to Rebut the Insanity Defense, 58 U.Chi.L.Rev. 359 (1991).

a lawyer would be provided to him at state expense, if necessary, a Dane County detective gave the defendant his full *Miranda* rights less than an hour before the interview with Dr. Roberts.

For the reasons set forth, I would affirm the decision of the court of appeals. Like the court of appeals, I would remand for a new trial on the defendant's plea of not guilty by reason of mental disease or defect.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

-vs-

Case No. 92-C-690

JAMES P. MURPHY,

Respondent.

DECISION AND ORDER

This matter comes before the Court on Aaron Lindh's ("Lindh") petition for a writ of habeas corpus under 28 U.S.C. § 2254. By way of procedural background, the Court first notes that this matter was initially pending before another branch of this District Court, at which time Lindh filed a motion to compel the State to produce the transcripts of the underlying state trial court proceedings. The State opposed this motion on the grounds that the Court should first address a preliminary constitutional issue raised by Lindh's petition, *i.e.*, whether the Sixth Amendment's right to confrontation applies during the insanity phase of a bifurcated criminal proceeding. This issue, the State argued, did not require reference to the voluminous transcript and, if decided in the State's favor, would obviate the need to reproduce the same. The matter was subsequently transferred to this Court. After a preliminary review of the pleadings, the Court bifurcated the issue in the manner suggested, primarily because Lindh had no objection to the State's preference to proceed with the constitutional issue first.

The Court recently reviewed this file with an eye towards deciding the constitutional issue briefed by the parties. During the course of this review, however, it became clear to the Court that proceeding in the manner requested by the State was a mistake. Indeed, after a thorough review of the decisions from the Wisconsin Court of Appeals and Wisconsin Supreme Court in this case, it is clear that those courts, along with the trial court, operated under the assumption that the Sixth Amendment's right to confrontation applied during the insanity phase of Lindh's trial. Ultimately, however, the Supreme Court affirmed the trial court's decision denying the cross-examination at issue on *relevancy* – not constitutional – grounds. The Supreme Court did so after a thorough review of the evidence and the voir dire relied upon by the trial court, evidence which is already before the Court through respondent's answer herein. Thus, if the state courts were correct in their determination of the relevancy issue, the constitutional issue need not be reached. The Court therefore discusses the relevancy issue first.

I. MOTION FOR TRANSCRIPTS

Lindh's motion to produce the full transcript of the trial court proceedings was tabled on the assumption that the Court was going to address the constitutional issue first. Now that the Court has decided to proceed differently, the motion should be addressed. The Court denies the motion. Full transcripts are not always, or even often, necessary to enable a federal court to decide a § 2254 habeas petition. Here, the question involved is whether the proposed cross-examination of a psychiatric doctor

who examined Lindh was relevant as showing potential bias on the part of the doctor. When Lindh first learned of the potential for bias, his counsel submitted a list of factual questions to the assistant district attorney, seeking detailed information as to the facts supporting the allegations of bias. The Court has a copy of those questions. In response, the assistant district attorney provided detailed answers to all of the questions submitted: The Court has a copy of those answers. During hearings connected with the trial, the State moved to exclude any cross-examination regarding the facts and circumstances of the alleged bias on relevancy grounds, arguing that the facts established by the State in response to Lindh's written questions establishes that the doctor at issue could not possibly have been biased in the manner alleged by Lindh. The trial court first agreed with the State, but then later allowed the parties to voir dire the doctor, outside of the presence of the jury, regarding the facts and circumstances supporting the claims of bias. The Court has a copy of the voir dire transcript. The trial court found, and the Supreme Court agreed, that the testimony brought out on voir dire, which included cross-examination by Lindh's counsel, fully confirmed the facts detailed in the State's responses to Lindh's written questions. Lindh himself acknowledges that the "voir dire disclosed no material variance between Dr. Roberts own responses and Prosecutor Burr's written answers to the defense's Specific Demand for Exculpatory Evidence." (Respondent's Answer, Ex. B at 16, fn. 3.) The trial court then re-affirmed its legal conclusion that the undisputed facts did not give rise to a reasonable inference of bias, and therefore

denied the proffered cross-examination on relevancy grounds.

Therefore, it appears to the Court that the facts underlying Lindh's petition are undisputed and contained in Lindh's written questions, the State's written responses thereto, the voir dire transcript, and the Wisconsin Supreme Court's discussion of the issues in its written opinion, found at *State v. Lindh*, 161 Wis.2d 324 (Wis. 1991). All of the foregoing are already before the Court by way of the respondent's answer. The question before the Court, therefore, is simply the legal question of whether those facts were relevant, *i.e.*, whether they gave rise to a reasonable inference of bias, such that a reasonable jury could have disregarded Roberts' testimony as biased and thereby reached a different verdict on the question of insanity. The Court need not have any other portions of the record before it to make that determination. Nor is a traverse necessary from the petitioner. Indeed, on this issue, the Court already has the benefit of the briefs submitted by petitioner to the Wisconsin Court of Appeals and Wisconsin Supreme Court, as well as the decisions from those courts, including the Court of Appeals' decision, which agreed with petitioner's argument.

II. RELEVANCY

A. Facts.

In the underlying proceedings, Lindh was charged with, *inter alia*, two counts of first degree murder and one count of attempted first degree murder. *Id.* The day of the

shootings, and shortly after Lindh was taken into custody, Dane County Assistant District Attorney John Burr ("Burr") retained Dr. Leigh Roberts ("Roberts"), a forensic psychiatrist, anticipating that Lindh or others might raise questions concerning Lindh's mental state during the shootings at issue. *Id.*, 161 Wis.2d at 335. That same night, January 15, 1988, Roberts interviewed Lindh in the hospital for purposes of assessing his mental state. *Id.*, at 336. The interview consisted of two sessions of questioning separated by a single 12-minute break. *Id.*, at 336-38.

On February 26, 1988, Lindh was arraigned and entered pleas of not guilty and not guilty by reason of mental disease. *Id.*, at 338. Roberts was appointed by the Court as one of the doctors who were to examine Lindh on behalf of the State. *Id.* Shortly thereafter, on March 8, 1988, Roberts became aware that the University of Wisconsin Hospital was investigating an allegation that he had engaged in sexual misconduct with a female patient. *Id.* At the time, Roberts was generally aware that, if proven true, such allegations could subject him to criminal penalties under a state statute, and he presumed that any such prosecution, if it came to that, would occur in Dane County, where the allegations were made, and would be prosecuted by someone in the Dane County District Attorney's office. *Id.* Although he admits having this general knowledge, Roberts did not give any particularized thought to the possibility of such a prosecution by the Dane County district attorneys. *Id.* Sometime in May, 1988, Roberts became aware that the Medical Examining Board was also investigating allegations of sexual misconduct by Roberts with three female patients. *Id.*, at 339. Roberts learned of this investigation when he

received a request for records from the examining board. *Id.*

On June 22, 1988, Roberts interviewed Lindh again, this time at the Dane County jail. *Id.* The next day, unbeknownst to Roberts, University of Wisconsin Hospital attorneys met with the Dane County District Attorney and referred to him the allegations against Roberts. *Id.* At that meeting, the District Attorney informed hospital officials that he would immediately seek to transfer the matter to a special prosecutor because of the potential for a conflict of interest between his office and Dr. Roberts. *Id.* On June 28 or 29, 1988, the Dane County Circuit Court appointed the Milwaukee County District Attorney's office as special prosecutor for the Roberts matter. *Id.* At this time, Roberts had no knowledge that charges had been referred to the Dane County District Attorney or that a special prosecutor had been appointed to investigate those charges. *Id.* No member or representative of the Dane County District Attorney's office, nor any police officer, ever contacted Roberts or his counsel concerning these allegations. *Id.* Nor did anyone from the Dane County District Attorney's office ever make a formal or informal decision as to whether a formal investigation should proceed, or ever contact the special prosecutor regarding the actual investigation. *Id.* at 339-40.

On July 8, 1988, Roberts became aware, for the first time, through his attorney, that allegations had been referred to the Dane County District Attorney's office. *Id.*, at 339. At the same time, Roberts also learned that a special prosecutor from outside of Dane County had already been appointed to investigate the allegations. *Id.*, at 339-40. On August 17, 1988 Roberts submitted his

report concluding that Lindh was not suffering from a mental disease or defect at the time of the shootings. *Id.*, at 340. On August 22, 1988, Roberts interviewed Lindh for the last time. *Id.*

On September 7, 1988, Lindh submitted his aforementioned discovery demand upon the State seeking detailed information as to the misconduct allegations against Dr. Roberts and the timing and substance of Roberts knowledge regarding the same. *Id.* The State promptly responded, and Lindh acknowledged that the State fully complied with his discovery request. *Id.*, at 340-41. In a hearing on the State's subsequent motion in limine, the trial court heard oral argument on the same and concluded that the proffered evidence – consisting of the State's responses to Lindh's discovery questions – was irrelevant. *Id.*, at 341-43. The trial court reasoned that in light of the fact that the allegations against Dr. Roberts were almost instantaneously transferred out of the Dane County District Attorney's office to the special prosecutor, there was no possibility of bias, motive or interest on the part of Dr. Roberts. *Id.* at 343. The trial court also concluded that, even if relevant, the probative value of the evidence had to be weighed against the risk of "unfair prejudice", and found that the latter outweighed the former, providing another ground for precluding the cross-examination at issue. *Id.* At the same time, however, as indicated earlier, the trial court allowed Lindh's counsel to voir dire Dr. Roberts outside the presence of the jury, which voir dire essentially confirmed and reiterated the information contained in the state's response to Lindh's discovery questions. *Id.*, at 343-44. For that reason, the

trial court found no reason to alter its prior ruling granting the State's motion in limine. *Id.*

On appeal, the Wisconsin Court of Appeals reversed the trial court's ruling regarding the relevancy of the proffered cross-examination and the risk of unfair prejudice presented by the same. *State v. Lindh*, 156 Wis.2d 768 (Wis.Ct.App. 1990). The Wisconsin Supreme Court granted review of the appellate court's decision and reversed the same, finding that the trial court did not abuse its discretion in finding the proffered evidence irrelevant. *Lindh*, 161 Wis.2d at 345-49. This Court agrees.

B. Analysis.

As The Wisconsin Supreme Court explained, "[t]he confrontation clause of the Sixth Amendment of the United States constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him' " *Lindh*, 161 Wis.2d at 345-46. More specifically, "[t]he United States Constitution protects the opportunity to cross-examine a witness with regard to bias and motivation to lie." *Bell v. Coughlin*, 778 F. Supp. 164, 174 (S.D.N.Y. 1991), *aff'd*, 17 F.3d 390 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 2685 (1994). Indeed, " 'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' " *Lindh*, 161 Wis.2d at 346. However, the U.S. Supreme Court has also ruled that the right of cross-examine [sic] is not unlimited:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986). Thus it is said that "[t]he confrontation clause 'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.' " *Id.*, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294 (1985). "Furthermore, the denial of a defendant's opportunity to impeach a witness for bias and motivation to lie, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis." *Bell*, 778 F. Supp. at 174.

Under the foregoing principles, the question becomes whether or not the jury might have reasonably assessed Dr. Roberts' credibility and opinion differently had Lindh's defense counsel been permitted to pursue the line of questioning regarding the allegations of sexual misconduct. *See Bell*, 778 F. Supp. at 174. If the evidence Lindh hoped to bring out could not reasonably support the conclusion that Roberts was biased against Lindh or had an ulterior motive to render an opinion favorable to the prosecution's case, the Confrontation Clause was not violated. As stated earlier, the evidence Lindh hoped to bring out consisted of the facts contained in Lindh's voir dire of Roberts and the State's answers to Lindh's written discovery demands. That evidence clearly shows that, by the time Roberts was aware that the allegations of sexual misconduct had been referred to the District Attorney's

office, the matter had already been transferred to a special prosecutor outside of Dane County. At that point, because the matter was already out of the hands of Dane County authorities, Roberts had no reason to believe that he would obtain some form of leniency in exchange for an opinion favorable to the prosecution in the Lindh case. The Court agrees wholeheartedly with the analysis of the Wisconsin Supreme Court in this regard:

> Clearly, up until July 8, 1988, there was no reasonable possibility for bias, motive or interest on the part of Dr. Roberts because until that date he did not know that any allegations had been referred to the Dane county district attorney's office. Because Dr. Roberts became aware of the immediate transfer of the matter to the special prosecutor at the same time he had no reason to believe after July 8, 1988, that the Dane county district attorney's office would be in a position to prosecute him and thus possibly favor him in exchange for his testimony. Dane county was not in a position to make any "deals," reduce any charges, or even make any recommendation as to any criminal investigation or prosecution against Dr. Roberts and Dr. Roberts knew it. He therefore had no reason to favor the prosecutor in the instant case by testifying or giving a report favorable to him.
>
> The relationship between the Dane county district attorney's office and Dr. Roberts which would be necessary to suggest bias, interest or motive simply did not exist. The disclosure provided by the prospector upon the request of the defense and the voir dire of Dr. Roberts unequivocally showed the same thing. There is no reason whatsoever to conclude that there was

> fertile ground for even the seed of a "deal" to be sewn and to germinate under those circumstances. To suggest that Dr. Roberts' testimony would be influenced in favor of the prosecution under these circumstances amounts to mere speculation. There being no nexus between the future criminal investigation and prosecution of Dr. Roberts, if any were to be undertaken, and the Dane county district attorney's office, a jury could not reasonably find a logical connection between the two, because none existed.

Lindh, 161 Wis.2d at 350-51. Because the jury's assessment of Roberts' testimony could not reasonably have been altered by the excluded evidence, the trial court did not violate petitioner's 6th Amendment rights.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Lindh's petition is denied and the case dismissed.

Dated at Milwaukee, Wisconsin, this 4th day of October, 1995.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92-C-690

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

✔ **Decision by Court.** This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Aaron Lindh's 28 United States Code, Section 2254 Petition for a Writ of Habeas Corpus is DENIED. This action is hereby DISMISSED.

October 4, 1995
Date

/s/ SOFRON B. NEDILSKY
Clerk

/s/ Linda M. ZR
(By) Deputy Clerk

Aaron LINDH, Petitioner-Appeliant,

v.

James P. MURPHY, Warden, Respondent-Appellee.

No. 95-3608.

United States Court of Appeals, Seventh Circuit.

Argued April 9, 1996.

Reargued En Banc June 17, 1996.

Decided Sept. 12, 1996.

Before POSNER, Chief Judge, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

In January 1988 Aaron Lindh marched into the City-County Building of Madison, Wisconsin, and shot three strangers for no apparent reason. Two died. Lindh pleaded guilty to carrying and using a firearm in a public building; a jury convicted him of two murders and one attempted murder. During the second phase of a bifurcated proceeding, Lindh argued that he was insane at the time of the shootings, which under Wisconsin law would alter the place of his confinement (from a prison to a prison-hospital) and entitle him to release if at some future time he should be deemed "recovered." But the jury found that Lindh did not have a mental disease when he pulled the trigger, and the judge sentenced him to life plus 35 years in prison.

Lindh's principal contention on appeal was that the judge unduly restricted his cross-examination of Dr. Leigh Roberts, a psychiatrist who interviewed him on the day of the shootings (and several times thereafter) and testified for the prosecution during the second phase of the trial. During March 1988 Roberts learned that he was under investigation for engaging in improper sexual conduct with a female patient; in May 1988 Roberts learned that the Medical Examining Board was looking into allegations made by three female patients. By the time of trial in September 1988 a criminal investigation was ongoing – conducted by the Milwaukee County District Attorney, acting as a special prosecutor after the Dane County District Attorney (whose jurisdiction includes Madison) recused himself. Lindh's attorney sought to explore the allegations made against Roberts, contending that the pending investigation would give Roberts a reason to slant his testimony in the prosecution's favor. Lindh did not argue that Roberts had entered into discussions with the prosecutor about the sexual misconduct allegations; any plea agreement or negotiations in progress would have been subjects of cross-examination under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Instead Lindh argued that even if the Dane County prosecutor could not provide a quid pro quo by forgoing charges or reducing their severity, he might put in a good word with the Milwaukee prosecutor; and whether or not lenity was in the cards, Roberts might *believe* that he had something to gain from helping to convict Lindh, which could color his analysis and testimony. Lindh argued that both state law and the Confrontation Clause of the Sixth Amendment, applied to the

states by the due process clause of the Fourteenth, entitled him to cross-examine Roberts about all potential sources of bias. See *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The trial judge foreclosed inquiry into this subject (although he permitted extensive cross-examination on other matters), the court of appeals reversed, *State v. Lindh*, 156 Wis.2d 768, 457 N.W.2d 564 (Wis.App.1990), and the Supreme Court of Wisconsin reversed in turn, reinstating the sentences, *State v. Lindh*, 161 Wis.2d 324, 468 N.W.2d 168 (1991). The state's highest court concluded that the possibility of bias was so remote, given the appointment of a special prosecutor, and the prospect of diverting attention to the sexual encounters (a subject of no relevance to Lindh's sanity) sufficiently great, that the trial judge did not abuse the discretion he possessed under both state and federal law. Justice Abrahamson dissented on state-law grounds. 468 N.W.2d at 185-89. Lindh then commenced a collateral attack in federal court. The district court denied the petition, writing that it "agrees wholeheartedly with the analysis of" the state's Supreme Court. Lindh appealed to this court.

Fifteen days after a panel heard oral argument, the President signed the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214. Section 104 of the new statute amends 28 U.S.C. § 2254, the law under which Lindh seeks relief. Unaffected by the 1996 Act, § 2254(a) provides that a writ of habeas corpus

may issue "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." It does not further elaborate. Federal courts exercising their authority under § 2254(a) disregarded the state courts' legal conclusions and reached independent judgments on issues presented to them. *Brown v. Allen*, 344 U.S. 443, 458, 73 S.Ct. 397, 407-08, 97 L.Ed. 469 (1953). Section 104(2) of the 1996 Act redesignates the former § 2254(d), which deals with state courts' findings of fact, as § 2254(e); § 104(3) of the 1996 Act, 110 Stat. 1219, adds a new § 2254(d) that for the first time specifies the appropriate treatment of legal determinations by state courts:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

We set this case for reargument before the full court in order to decide whether the new provision applies to pending cases and, if it does, how it affects them. We invited and received supplemental briefs from the parties, and we have had the benefit of briefs from the

American Bar Association and a group of former federal judges as *amici curiae*.

I

Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), lays out a sequence of issues. First we must decide whether Congress has decided to which cases a new law applies; if it has, the only task is to follow the statute. If Congress has not provided one way or the other, we must apply the law in force at the time of decision – which is to say, the new § 2254(d) – unless "the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at ___, 114 S.Ct. at 1499. But what is a "new legal consequence"? *Landgraf* says that not every change in outcome counts; it matters whether the party adversely affected by the change has legitimate reliance interests in the operation of the former law.

A

Has Congress answered the question at hand? Not directly. Section 104 of the 1996 Act lacks an effective-date provision. Lindh contends that Congress addressed the subject indirectly, by providing that the new Chapter 154 of Title 28 (28 U.S.C. §§ 2261-66), captioned Special Habeas Corpus Procedures in Capital Cases and contained in § 107(a) of the 1996 Act, applies "to cases pending on or after the date of enactment of this Act." Section 107(c), 110 Stat. 1226. This establishes, Lindh submits, that §§ 101 to 106 of the statute do *not* apply to pending cases.

"Establishes" is too strong a word. Sections 101 to 106 amend Chapter 153 of Title 28. Nothing in the 1996 Act provides one way or another for the temporal extent of the changes. Do they govern collateral attacks arising out of crimes committed after April 24, 1996? Convictions after that date? Appellate decisions after that date? Collateral attacks filed after that date? The statute is silent. Congress addressed those issues for Chapter 154, but not Chapter 153. There is at most a negative implication. Should we draw it? A competing inference is that Congress could not agree on an effective-date provision for the amendments to Chapter 153, leaving the subject to judicial resolution. Perhaps instead Congress overlooked the subject when drafting §§ 101-106 (the changes to Chapter 153 and the new Chapter 154 originated in different Houses of Congress at different times) – or recognized its importance but thought the answer so clear that express provision was unnecessary. Which understanding is superior?

Potential negative implications of effective-date provisions have been urged before, most recently in *Landgraf*. The Civil Rights Act of 1991 provides that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." The Court held that this language "does not even arguably suggest that [the Act] has any application to *conduct* that occurred at an earlier date." 511 U.S. at ___, 114 S.Ct. at 1493 (emphasis added). Two other provisions of the 1991 Act are more explicit. One says that the statute does not apply to a particular ongoing case; the other says that the extension of the civil rights laws to

overseas employers "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Landgraf argued that these two anti-retroactivity provisions established that the rest of the 1991 Act applied to conduct preceding its enactment. Otherwise the two anti-retroactivity provisions would be irrelevant, and courts try to interpret laws to avoid both irrelevance and redundancy. *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1494. The Court conceded this but held nonetheless that the 1991 Act is effectively silent on the question. *Id.* at ___-___, 114 S.Ct. at 1494-96. It was unwilling to draw a negative implication from two provisions that may have been inserted just to make double sure. Although "a majority of the 1991 Congress [may have] favored retroactive application, even the will of the majority does not become law unless it follows the path charted in Article I, § 7, cl. 2 of the Constitution" (511 U.S. at ___, 114 S.Ct. at 1496) – that is, unless it yields a text agreed on by both Houses and signed by the President.

Just so with the 1996 Act. And the argument by negative implication is weaker for the 1996 Act than for the 1991 Act. The Supreme Court's holding in *Landgraf* made two sections of the statute irrelevant. Nothing we could hold, one way or the other, about §§ 101-106 could deprive § 107(c) of independent meaning. True enough, 28 U.S.C. § 2264(b), in Chapter 154, refers to § 2254(d), so § 107(c) requires the application of the amended § 2254(d) to capital cases within the scope of Chapter 154. But we think that Lindh misunderstands Chapter 154 when contending that § 2264(b) has "no function other than to cause certain of the otherwise inapplicable Chapter 153

revisions to apply retroactively" (Supp. Reply Br. 3). Section 2264(a) provides that, when Chapter 154 applies, a court shall consider only "a claim or claims that have been raised and decided on the merits in the State courts" unless failure to raise a claim was caused by one of three identified circumstances. Section 2264(b) adds: "Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it." Why only "subsections (a), (d), and (e) of section 2254"? Surely not because these are to be retroactive, while subsections (b), (c), (f), (g), (h), and (i) are not. If as Lindh believes the only reason to include § 2254(d) in § 2264(b) is to apply it to pending cases, then this must also be the sole reason for referring to § 2254(a) – but § 2254(a) is not amended by the 1996 Act, while many subsections omitted from the list in § 2264(b) were amended or added by the new statute.

Section 2264(b) conveys its meaning only when read together with § 2264(a). Subsections (b) and (c) of § 2254 have been omitted from the list because § 2264(a) *replaces* their rule with one more favorable to the states. Section 2254(b) and (c) codify the exhaustion requirement, which § 2264(a) displaces for Chapter 154 cases. The remaining subsections of § 2254 likewise don't fit the Chapter 154 scheme. For example, § 2254(i), added by the 1996 Act, says that "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 110 Stat. 1219. Chapter 154 addresses this question directly in the new 28 U.S.C. § 2261(e), 110 Stat. 1222, making incorporation of § 2254(i) inapt. Section 2264(b) tells us not "when," but

"which." Lindh's argument therefore misses the mark: this section neither addresses any other section's temporal effectiveness nor is made irrelevant by applying § 2254(d) to pending cases.

Chapter 154 comprises many rules that Congress evidently wanted to apply forthwith no matter what the courts made of §§ 101-106. For example, the new 28 U.S.C. § 2262(a) provides for automatic stays of execution during initial collateral attacks covered by Chapter 154. Prisoners on death row received stays on April 24, 1996, even if courts had denied stays under prior law. Having blocked executions while litigation continues, Congress curtailed the time federal courts may take to act – for example, a court of appeals must decide a capital appeal within 120 days after the filing of the reply brief. 28 U.S.C. § 2266(c)(1)(A). Section 107(c) applies that limit to pending capital cases, a step that serves quite a different function from a decision one way or the other about the application of § 2254(d) to non-capital cases. Congress obviously wanted to *ensure* that both the stays of execution and the time limits – provisions of Chapter 154 without counterparts in Chapter 153 – extended to as many cases as possible. Nothing about that decision has any implications for Chapter 153. We conclude that § 107(c) does not govern the question at hand. Sections 101-106 lack an effective-date provision. We must decide what to do when the legislation is silent.

B

Landgraf reiterates two long-established rules that govern when the legislature is silent: first, courts normally apply the law in force at the time of decision; second, the court does not use the new law if application would be "retroactive." Each side appeals to one of these propositions. Wisconsin contends that § 2254(d) is today's rule of decision and should be applied. Lindh rejoins that § 2254(d) would be "retroactive" to the extent it reduces his chance of prevailing. He also contends that he is entitled to a writ of habeas corpus whether or not § 2254(d) applies, but he uses the possibility of an adverse effect as the definition of retroactivity. As a definition, it will not do – for it would obliterate the first rule, turning it into something like "a court applies the law in force at the time of its decision whenever it is the same as the law in force all along." *Landgraf* was explicit that "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct". 511 U.S. at ___, n. 24, 114 S.Ct. at 1499 n. 24; see also *id.* at ___-___, 114 S.Ct. at 1501-04.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1499 (citation and footnote omitted). Section 2254(d) does not attach new legal consequences to the filing of petitions for habeas corpus, although some other parts of the 1996 Act may do this. We take it that under *Landgraf* a certificate of probable

cause to appeal issued before April 24, 1996, authorizes an appeal, although after April 24 appeal depends on a "certificate of appealability" under § 102 of the 1996 Act (amending 28 U.S.C. § 2253(c)), which not only changes the name but also requires the court to identify the appealable issue. Similarly, a second or successive petition already pending on April 24 does not require prior approval of the court of appeals under § 106 (amending 28 U.S.C. § 2244(b)), see *Williams v. Calderon*, 83 F.3d 281, 285-86 (9th Cir.1996), although the application of the substantive standards in the new § 2244(b) to determine who is eligible for relief is a more difficult question, which the court addresses separately today in *Burris v. Parke*, 95 F.3d 465 (7th Cir.1996).

For a provision such as § 2254(d), which affects the relation between federal and state courts, rather than regulating the details of litigation, the date on which the petition was filed can't be any more important than the date on which the suits were filed in *Landgraf* and *Mojica v. Gannett Co.*, 7 F.3d 552 (7th Cir.1993) (en banc). In *Landgraf* the Court asked whether the Civil Rights Act of 1991 could be applied to employment decisions that preceded the statute. A lawsuit concerning 1990 conduct is governed by 1990 law, no matter when the suit began, *Landgraf* held (as we had held in *Mojica*, 7 F.3d at 558-59). See also *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). The parallel question is whether the 1996 Act may be applied when the crime or state court decision preceded April 24, 1996.

Understandably, Lindh does not argue that, when deciding whether to commit a crime (and, if so, which one), he relied on the availability of the version of § 2254

that was on the books in 1988. Under the Ex Post Facto clauses people charged with crime have powerful, and enforceable, expectations about the legal rules that apply to their conduct. But the 1996 Act does not change any of the rules defining or penalizing crime. Moreover, having lost in the state's judicial system before the amendment, Lindh cannot successfully argue that the change of law affected the judicial process. By any standards, the former version of § 2254 was more favorable to prisoners than the current one, and the prospect of more intensive review by federal courts may have made state courts more attentive to claims under federal law. Lindh wants us to cast a darker light on state judges – to assume that the prospect of plenary federal review made them inattentive to federal rights, because then they could appear tough on crime (to improve reelection prospects) while knowing that the people they confine in prison would eventually be let go. He does not offer any empirical support for believing that state judges wrongfully imprison people to further their own careers, and in Wisconsin judges who proclaim willingness to give defendants extra rights have had no difficulty being retained. See Shirley S. Abrahamson, *The Emergence of State Constitutional Law*, 63 Tex.L.Rev. 1141 (1985). It would not be appropriate to presume that the Justices of the Supreme Court of Wisconsin treated Lindh poorly because they anticipated independent federal review.

Section 2254(d) does not regulate primary conduct. Instead it makes the initial judgment more stable. Do prisoners have legitimate expectations about the scope of collateral review? This is a question the Supreme Court addressed in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct.

838, 122 L.Ed.2d 180 (1993). A prisoner called his lawyer ineffective for failing to take full advantage of an appellate opinion that was overruled after the prisoner commenced his collateral attack. The Supreme Court held that the prisoner could not rely on the overruled decision (or obtain relief because his lawyer failed to do so, when he could), even though its disappearance reversed the outcome of his case. The Court's discussion is worth quoting:

> The dissent contends that this holding is inconsistent with the retroactivity rule announced in *Teague v. Lane*, 489 U.S. 288, 310 [109 S.Ct. 1060, 1075, 103 L.Ed.2d 334] (1989), but we think otherwise. *Teague* stands for the proposition that new constitutional rules of criminal procedure will not be announced or applied on collateral review. As the dissent acknowledges, this retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on "the constitutional standards that prevailed at the time the original proceedings took place." "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 [110 S.Ct. 1212, 1217, 108 L.Ed.2d 347] (1990).

A federal habeas petitioner has no interest in the finality of the state court judgment under which he is incarcerated: indeed, the very purpose of his habeas petition is to overturn that judgment. Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a

> basis for his actions that corresponds to the State's interest described in the quotation from *Butler, supra*. The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it. *Cessante ratione legis, cessat et ipsa lex.*

506 U.S. at 372-73, 113 S.Ct. at 844 (citations omitted). In other words, legal changes that reduce the willingness of federal courts to set aside judgments presumptively apply to existing judgments.

This is the historical practice. The Supreme Court consistently applies statutory changes in the law of collateral attack to pending cases, and perforce to newly filed cases that seek relief from judgments entered before the statute's enactment. In *Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), the Court decided a case under the 1996 Act's standards, even though the conviction preceded the amendments. (The petition for habeas corpus in *Felker* was filed after April 24, 1996, but we have already explained why the date of the petition cannot be dispositive.) Thirty years ago Congress made extensive amendments to Chapter 153, which the Court applied to cases under review without so much as remarking on the date of enactment. *Smith v. Yeager*, 393 U.S. 122, 124-25, 89 S.Ct. 277, 278-79, 21 L.Ed.2d 246 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968). Earlier amendments to the rules of collateral attack likewise were brought to bear in pending cases. *Gusik v. Schilder*, 340 U.S. 128, 131-33 & n. 4, 71 S.Ct. 149, 151-52 & n. 4, 95 L.Ed. 146 (1950), implements the exhaustion requirement introduced by the 1948 amendment to § 2254. Accord, *Darr v. Burford*, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950).

The language of the amendments likewise implies immediate application. Recall that § 2254(d) does not empower a court to issue the writ. Instead it *forbids* issuance of the writ – the application "shall not be granted unless" certain conditions have been met. The prohibition is prospective: a court must not issue the writ tomorrow, unless. . . . The difference between an authorization and a prohibition is one we must respect. See *Ivey v. Harney*, 47 F.3d 181 (7th Cir.1995). It is the sort of difference that the Supreme Court has relied on when holding that changes in the law affecting judicial ability to supply prospective relief govern pending cases. E.g., *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201-02, 24 L.Ed.2d 214 (1969); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201-02, 42 S.Ct. 72, 75-76, 66 L.Ed. 189 (1921); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464, 41 S.Ct. 172, 175, 65 L.Ed. 349 (1921), all discussed favorably in *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1501. Current law normally governs when statutes "speak to the power of the court rather than to the rights or obligations of the parties," *Republic National Bank of Miami v. United States*, 506 U.S. 80, 99-100, 113 S.Ct. 554, 565, 121 L.Ed.2d 474 (1992) (Thomas, J., concurring) (quoted with approval in *Landgraf*, 511 U.S. at ___, ___, 114 S.Ct. at 1499, 1502). We do not suggest that § 2254(d) reduces the power of the court in the sense of subject-matter jurisdiction, which survives intact in 28 U.S.C. § 2241; a state may waive the benefits of § 2254(d),

although other provisions of the 1996 Act, such as the revised exhaustion requirement in § 2254(b), suggest that counsel's inattention to the niceties of federal practice does not forfeit the benefits the law bestows on the state as an entity. See also *Eaglin v. Welborn*, 57 F.3d 496, 498-99 (7th Cir.1995) (en banc) (holding that a court may decide a case on the basis of *Teague* even if the state's lawyers overlooked that possibility). Our point, rather, is that the amended § 2254(d) is designed to curtail collateral review and augment the finality of judgments, which strongly implies application to existing judgments.

C

Lindh and the State of Wisconsin litigated in the state's forums the constitutional claim he presents to us. To leave the ensuing judgment in force – and to leave all of the rules governing primary conduct intact – is not "retroactive" in the sense *Landgraf* uses that term, and the amended § 2254(d) is therefore presumptively applicable. We respectfully disagree with the contrary conclusions of *Edens v. Hannigan*, 87 F.3d 1109, 1111 n. 1 (10th Cir.1996), and *Boria v. Keane*, 90 F.3d 36 (2d Cir.1996).

There remains a possibility that application of the 1996 Act could "attach new legal consequences" to events *other* than the crime and the state's legal processes and judgment. Consider, for example, how the filing deadline in § 101 of the 1996 Act applies to existing judgments. Under the new statute, 28 U.S.C. § 2244(d), a petitioner has only one year from the completion of direct review to commence a collateral attack; there was no corresponding

limit in prior law, although Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts established an amorphous standard linked to prejudice to the state. A prisoner could wait a decade without transgressing Rule 9(a). See *Lonchar v. Thomas*, ___ U.S. ___, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996). Lindh got his collateral attack under way less than a year after the Supreme Court of Wisconsin decided his case. But suppose he had waited two years, filing in 1993 rather than 1992. Would we now apply § 2244(d) and dismiss the petition? Not at all. A prisoner's decision to defer filing – perhaps while doing legal research, or while waiting for the Supreme Court to decide a case that could influence the selection of issues – is the sort of event to which the amended statute would "attach new legal consequences." Courts treat a reduction in the statute of limitations as a rule for new cases only. See *Landgraf*, 511 U.S. at ___ n. 29, 114 S.Ct. at 1502 n. 29. And although no decision of the Supreme Court addresses the question directly, we do not doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway. A new statute is unlike a judicial construction of an existing statute, which after *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), governs all pending cases. Section 2244(d) is short enough that the "reasonable time" after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed

under § 2244(d) and the parallel provision added to 28 U.S.C. § 2255 by § 105 of the 1996 Act.

But Lindh lacks any reliance interest nearly that strong. His able counsel identifies only two steps he took (rather, omitted) in supposed reliance on the prior state of the law: he did not ask the Supreme Court of the United States to review the decision of the Supreme Court of Wisconsin, and he did not file a collateral attack in state court. Let us start with the omission of a petition for certiorari. Lindh observes that the Supreme Court, engaged in direct review under 28 U.S.C. § 1257, would not have been (and still is not) affected by § 2254(d). That is true enough, but even under the former text of § 2254 petitioners faced obstacles (such as the exhaustion requirement, the special protection of state courts' findings of fact, and the *Teague* doctrine) that did not apply on direct review under § 1257. A court exercising appellate jurisdiction has now, and had in 1991, more authority to correct errors than a court hearing a collateral attack. Defendants in state cases bypass their opportunity to seek certiorari not because they expect favorable treatment under § 2254, but because they recognize that the Supreme Court of the United States rarely grants such requests. "A petition for a writ of certiorari will be granted only for compelling reasons." S.Ct. R. 10. As a practical matter, to obtain direct review Lindh would have had to establish not only the national importance of the question at hand, but also that the decision of the Supreme Court of Wisconsin interpreted the Constitution in a way disagreeing with the interpretation of the highest court of another state, or of a United States court of appeals. S.Ct. R. 10(b). Lindh does not argue that his case

presents such an abstract legal question; instead he argues that the state's courts misapplied settled law to the facts of his case. Such a contention had no prospect in 1991 of receiving an audience in the Supreme Court of the United States, and Lindh gave up nothing of value by deciding not to seek certiorari. Lightning can strike a petition for certiorari, but Lindh's would not have been a good lightning rod.

As for the omission of a collateral attack in state court: Wisconsin would not have entertained one, had Lindh filed it. Wisconsin does not permit an inferior court to review a decision of the state's highest court. Wis. Stat. § 974.06. A prisoner who can establish an unusual reason, such as an intervening change of law, may wage a collateral attack in Wisconsin even after the state's Supreme Court has addressed the merits, see *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), but Lindh does not qualify for this exception – and, if he does, the state courts remain open to him. Lindh contends that the Supreme Court of Wisconsin misunderstood one factual question: whether Roberts' privileges at the University of Wisconsin Hospital had been suspended by the time of trial. The court wrote that the record did not show such a suspension, 468 N.W.2d at 173, and Lindh says that this is wrong. If so, and if this is important, Lindh could have sought rehearing in the state court or could have introduced factual support for his position in the federal district court. He did neither, raising this contention for the first time only in supplemental briefs filed after the case had been set for rehearing en banc. Issues raised so belatedly are forfeited; we deny the motion to supplement the record. Lindh's delay cannot be attributed to the

1996 Act, as he had ample opportunity to make his version of events known under both former and current § 2254 (the amended § 2254(e)(1), 110 Stat. 1219, authorizes a petitioner to dispute a factual determination by a state court, although proof of error requires clear and convincing evidence). Once again, therefore, Lindh's litigating decisions were not affected by the difference between the versions of § 2254. The 1996 Act does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at ___, 114 S.Ct. at 1505. The new law therefore governs our consideration of Lindh's contentions.

D

Almost as an afterthought, Lindh (with the support of the American Bar Association, as *amicus curiae*) asserts that *any* alteration in the scope of collateral review after a prisoner has filed a petition under § 2254 violates Art. I, § 9, cl. 2 of the Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Lindh does not cite any authority for this proposition, and we think the contention feckless. If the new § 2254(d) "suspends" the Great Writ, it does so no less for cases filed on April 25, 1996, than for cases pending on April 24. Yet to alter the standards on which writs issue is not to "suspend" the privilege of the writ. *Felker* so holds for another amendment made by the 1996 Act.

The writ known in 1789 was the pre-trial contest to the executive's power to hold a person captive, the device that prevents arbitrary detention without trial. *Ex parte Bollman & Swartwout*, 8 U.S. (4 Cranch) 75, 2 L.Ed. 554 (1807); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 18 L.Ed. 816 (1868); *Ex parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886). See *McCleskey v. Zant*, 499 U.S. 467, 478, 111 S.Ct. 1454, 1461-62, 113 L.Ed.2d 517 (1991); *Schlup v. Delo*, ___ U.S. ___, ___, 115 S.Ct. 851, 862, 130 L.Ed.2d 808 (1995). The power thus enshrined did not include the ability to reexamine judgments rendered by courts possessing jurisdiction. *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 5 L.Ed. 391 (1822); see also Dallin H. Oaks, *Habeas Corpus in the States – 1776-1865*, 32 U. Chi. L.Rev. 243, 244-45 (1965). Under the original practice, "a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal . . . [and] prevented issuance of a writ". *United States v. Hayman*, 342 U.S. 205, 211, 72 S.Ct. 263, 268, 96 L.Ed. 232 (1952); see also *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 101, 19 L.Ed. 332 (1869).

The founding-era historical evidence suggests a prevailing view that state courts were adequate fora for protecting federal rights. See Max Farrand, 1 *Records of the Federal Convention of 1787* 124-25 (1937). Based on this assumption, there was (and is) no constitutionally enshrined right to mount a collateral attack on a state court's judgment in the inferior Article III courts and, *a fortiori*, no mandate that state court judgments embracing questionable (or even erroneous) interpretations of the federal Constitution be reviewed by the inferior Article III courts.

Collateral review of judgments accordingly is subject to legislative control, as the first Congress, dominated by those who wrote and ratified the Constitution, recognized. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 7 L.Ed. 650 (1830). Section 14 of Judiciary Act of 1789 prohibited any inquiry by the federal courts into the propriety of state custody. 1 Stat. 82; see *Ex parte Dorr*, 44 U.S. (3 How.) 103, 11 L.Ed. 514 (1845). Congress first created a general power of collateral review in 1867, 14 Stat. 385, and then repealed it the next year, 15 Stat. 44, a step sustained in *McCardle*. (Limited powers created in 1833, 4 Stat. 634-35, to protect federal officers from state interference, and in 1842, 5 Stat. 53940, to protect foreign nationals, did not affect the bulk of criminal cases.) The general power was not reestablished until 1885, 23 Stat. 437, and has been subject to frequent revision by Congress – and reinterpretation by the Supreme Court – ever since. Collateral review of judgments entered after full opportunity for litigation is the work of the 20th Century. Whether the first occasion came in 1953 with *Brown v. Allen*, or that honor belongs instead to *Waley v. Johnston*, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942), or even *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915), which stretched the rule that a writ may issue when the convicting court lacks "jurisdiction" (see *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1874)), does not matter. Justices debated the question in *Wright v. West*, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), as a matter of statutory interpretation. "Judgments about the proper scope of the writ are 'normally for Congress to make.' " *Felker*, ___ U.S. at ___, 116 S.Ct. at 2340, quoting from *Lonchar*, ___ U.S. at ___, 116 S.Ct. at 1298. Any suggestion

that the Suspension Clause forbids every contraction of the powers bestowed by Congress in 1885, and expanded by the 1948 and 1966 amendments to § 2254, is untenable. The Suspension Clause is not a ratchet.

II

Section 2254(d)(1) provides that a writ may not issue unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". What does this mean? Is it congruent with the judicial role established by Article III of the Constitution? And how does it affect Lindh's contentions?

A

The Conference Report on the 1996 Act says that § 2254(d) "requires deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law." H.R.Conf.Rep. 104-518, 104th Cong., 2d Sess. 111 (1996). This passage, together with similar comments on the floor, has led to an unproductive debate among the parties ano the *amici* about what "deference" entails. It is a wonderful illustration why legislative history so often misleads – for the word "deference" does not appear in the statute. It does not tell us to "defer" to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron U.S.A. Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), depends on delegation. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). Congress did not delegate either interpretive or executive power to the state courts. They exercise powers under their domestic law, constrained by the Constitution of the United States. "Deference" to the jurisdictions bound by those constraints is not sensible. We see no need to pursue this subject, however, because our task is to construe the enacted statute, not to construe its legislative history.

The first phrase of § 2254(d)(1) – authorizing a federal court to issue the writ when the state court's decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States", preserves rather than undermines federal courts' independent interpretive power. Federal courts are free to express an independent opinion on all legal issues in the case. So if, for example, the Supreme Court of Wisconsin had held that the Confrontation Clause does not entitle defendants to cross-examine witnesses to establish bias, then *Davis v. Alaska* would show that the decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States", even if decent arguments could be constructed that *Davis* misunderstood the Confrontation Clause. Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law "as determined by the Supreme Court of the United States" that prevails.

This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty in this portion of § 2254(d)(1) is not the "contrary to" part but the reference to "Federal law, *as determined by the Supreme Court of the United States*" (emphasis added). This extends the principle of *Teague* by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ. It does not, however, purport to limit the federal courts' independent interpretive authority with respect to federal questions.

An application for a writ is only an invitation to a federal court to grant the requested relief upon its review of a criminal conviction and confinement under state law. See *Felker*, ___ U.S. at ___, 116 S.Ct. at 2339. The authority to issue the writ is conferred on courts by statute. *Ex parte Bollman & Swartwout, supra*. It is doctrinally distinct from the statutory grant of jurisdiction to decide a case or controversy, e.g., 28 U.S.C. § 1331. Yet just as Congress may restrict the jurisdiction of the inferior Article III courts, so it may prescribe limits on the granting of the extraordinary relief provided by the writ of habeas corpus.

A conflict between decisions of the Seventh Circuit and the Supreme Court of Wisconsin would not authorize issuance of a writ under § 2254(d)(1). State courts must knuckle under to decisions of the Supreme Court, but not of this court. So Lindh must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. He has *Davis* and *Van Arsdall*. We therefore

need not shoulder the potentially difficult task of determining when an appellate gloss on a decision of the Supreme Court has so far departed from its wellsprings as to be the "real" source of law, or when the chain of reasoning has stretched so long that the rule cannot be called "clearly established" as of the time the state court rendered its decision. These are the sorts of questions presented by the *Teague* standard, e.g., *Gray v. Netherland*, ___ U.S. ___, - ___ ___, 116 S.Ct. 2074, 2083-85, 135 L.Ed.2d 457 (1996); *Sawyer v. Smith*, 497 U.S. 227, 236, 110 S.Ct. 2822, 2828, 111 L.Ed.2d 193 (1990); *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990) ("compelled by existing precedent"), and the "clearly established" language is unlikely to pose a different kind of interpretive challenge.

The new § 2254(d)(1) adds a twist to the complexities of the *Teague* inquiry, however, because it explicitly identifies only the Supreme Court as the font of "clearly established" rules. This language could be understood to adopt an unfortunate view that applies the unitary model of the executive department to the judicial department as well. Such a view of the judiciary, which runs counter to the explicit textual differences between the vesting clauses of Articles II and III, assigns to the inferior Article III courts a role analogous to that of an executive agency. From this flawed perspective, the inferior courts are seen as agencies of the judicial department with authority derived from the power vested in the Supreme Court.

The Constitution vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III § 1. The vesting clause of Article III is quite different

from the vesting clause of Article II, which says that the "executive Power shall be vested in a President of the United States of America." Art. II § 1 cl. 1. By virtue of the grant in Article II to a single person, agencies of the executive department exercise executive authority on behalf of the President. See *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

In contrast, the judicial power is given by the Constitution to each of the inferior Article III courts. Accordingly, when these courts act within their jurisdictions, they exercise the judicial power directly, though subject to the limits of revisionary jurisdiction of a court superior within the Article III hierarchy. The inferior courts do not rely on the Supreme Court for their authority to exercise the judicial power, for this power is given them directly by Article III once they are ordained, established, and provided with jurisdiction by Congress.

Lindh would like us to stop here, to announce that § 2254(d) has not changed the law in any way material to his case, and to proceed to decision. We cannot do that, because one ingredient of Lindh's claim is not well established. The Confrontation Clause (and therefore the principles of *Davis* and *Van Arsdall*) governs at trial of the merits, but not at sentencing. Is the dispositional phase of a bifurcated trial closer to the merits, or to sentencing? We return to that question in Part II.C. Moreover, we do not read the "contrary to . . . " language to authorize issuance of a writ whenever a court errs, as Lindh and the *amici* prefer; that would vitiate the second ("unreasonable application") clause of § 2254(d)(1). The two clauses have separate functions. We must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated

by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts – when it is, in the standard phrase, a "mixed question of law and fact" – sec. 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application of" the law.

The reference to an "unreasonable application of Federal law" sounds like the official-immunity question in constitutional-tort litigation, but we doubt that this is quite the right analogy. Principles of immunity are designed to draw the line between prospective relief and damages from a governmental body, on the one hand, and payment from the pocket of a public employee, on the other. Section 2254(d)(1) serves an entirely different function. Perhaps, then, the unreasonable-application language should be understood as another variation on *Teague*. Recall the quotation in *Lockhart* from *Butler*: *Teague* "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Section 2254(d)(1) generalizes this principle of respect by withdrawing the "later decisions" proviso.

How much leeway does the "unreasonable application" language create? None on questions of interpretation. It does not authorize or permit state courts to deviate from the Constitution. Federal courts acting within their jurisdiction are always entitled to interpret the law independently. Section 2254(d)(1) as we read it does no more than regulate relief. It tells federal courts: Hands off, unless the judgment in place is based on an

error grave enough to be called "unreasonable." Historical practice (see Part I.D above) likewise counseled restraint in use of the writ. Other rules limiting the remedy abound. We have mentioned official immunity cases, in which federal courts retain full interpretive power, but forbear from using the remedy of damages. Consider, too, the doctrine of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), under which the exclusionary rule does not apply to evidence gathered in reasonable reliance on a search warrant, even if the warrant was issued in violation of the Constitution. In such cases the court retains (but need not exercise) the power to identify the state court's violation of the Fourth Amendment, see 468 U.S. at 925, 104 S.Ct. at 3422, but the remedy of suppression (and a new trial) is withheld unless the violation is obvious, or the officer's reliance unreasonable. The inevitable-discovery doctrine similarly specifies situations in which a constitutional violation (established by independent review in the federal courts) does not lead to the remedy of upsetting a criminal conviction. See *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

None of this answers the question when a departure is so great as to be "unreasonable," for that question lacks an abstract answer, just as courts have been unable to give precise content to phrases such as "abuse of discretion." Application of *Leon* therefore has required careful inquiry one case at a time, and we do not see how application of § 2254(d)(1) can be much different. For current purposes it is enough to say that when the constitutional question is a matter of degree, rather than of concrete entitlements, a "reasonable" decision by the

state court must be honored. By posing the question whether the state court's treatment was "unreasonable," § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.

Questions of degree – like questions about the proper use of "discretion" – lack answers to which the labels "right" and "wrong" may be attached. When the subject is painted in shades of grey, rather than in contrasting colors, a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment. Think of the Speedy Trial Clause of the Sixth Amendment, which after *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), does not prescribe a rule for "how long is too long" but rather establishes a list of factors to consider. The Supreme Court of the United States sets the bounds of what is "reasonable"; a state decision within those limits must be respected – not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions. That is the principal change effected by § 2254(d)(1).

B

The American Bar Association and a group of former federal judges, appearing as *amici curiae*, contend that § 2254(d)(1) is unconstitutional to the extent it requires anything less than plenary review of all contentions based on federal law. Their argument, distinct from Lindh's invocation of the Suspension Clause, is that the

"judicial Power of the United States" (Art. III § 1) is the power to interpret the law independently. They rely on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is") and modern statements such as *Plaut v. Spendthrift Farm, Inc.*, ___ U.S. ___, ___, 115 S.Ct. 1447, 1453, 131 L.Ed.2d 328 (1995), and *Gutierrez de Martinez v. Lamagno*, ___ U.S. ___, ___, 115 S.Ct. 2227, 2234, 132 L.Ed.2d 375 (1995).

If by this line of argument the *amici* mean that federal courts must give judgment without regard to the legal views of other public actors, and without regard to the resolution of contested issues in state litigation, then their argument reaches far beyond § 2254(d). It would mean that deference in administrative law under *Chevron* is unconstitutional; that the respect accorded to Congress when it speaks on constitutional questions (e.g., *Wisconsin v. New York City*, ___ U.S. ___, ___-___, 116 S.Ct. 1091, 1100-01, 134 L.Ed.2d 167 (1996); *Weiss v. United States*, 510 U.S. 163, 177, 114 S.Ct. 752, 760-61, 127 L.Ed.2d 1 (1994); *Donovan v. Dewey*, 452 U.S. 594, 603, 101 S.Ct. 2534, 2540, 69 L.Ed.2d 262 (1981); *United States v. Watson*, 423 U.S. 411, 416, 96 S.Ct. 820, 824, 46 L.Ed.2d 598 (1976)), must be abandoned; and that the Full Faith and Credit Clause (Art. IV § 1) conflicts with Article III. This position would demolish numerous doctrines in the law of collateral attack that no one (until now) has supposed pose constitutional difficulties.

Consider *Stone v. Powell*, 428 U.S. 465, 482, 96 S.Ct. 3037, 3046, 49 L.Ed.2d 1067 (1976), which holds that when a "State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution

does not require that a state prisoner be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at the trial." *Stone* contemplates – indeed it requires – that a federal court refrain from issuing a writ under § 2254 even though the court is convinced that the state judges erred on the law, and even though the error altered the outcome of the case. On several occasions the Supreme Court has treated *Stone* as a doctrine that on grounds of prudence could be extended to other subjects (although the Court has not so extended it). See *Reed v. Farley*, 512 U.S. 339, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) (claims under the Interstate Agreement on Detainers); *Withrow v. Williams*, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (claims based on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). If the Court could adopt *Stone* and consider extending its scope, creating a gap between the "merits" and the obligation to issue a writ, then Congress may do the same by amending § 2254.

Teague likewise establishes a disjunction between the meaning of the Constitution and the use of habeas corpus. If a state judgment becomes final in 1992, and the Supreme Court articulates a new rule of constitutional law in 1993, then a petition for collateral review in 1994 will fail – not because the state court was "right" on the merits, but because some errors of constitutional law do not support collateral relief. Section 2254(d)(1) codifies and extends the principle of *Teague*, and if *Teague* is consistent with Article III, then so is § 2254(d)(1) as we have construed it.

The *amici curiae* neglect a basic distinction that *Plaut* recognizes: Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases. See ___ U.S. at – ___ ___, 115 S.Ct. at 1452-53; see also *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441, 112 S.Ct. 1407, 1414-15, 118 L.Ed.2d 73 (1992). Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck, but it may prescribe maximum damages for categories of cases, *Carter v. United States*, 982 F.2d 1141 (7th Cir.1992), or provide that victims of torts by federal employees cannot receive punitive damages, see 28 U.S.C. § 2674. It may establish that if the driver was acting within the scope of his employment, the United States must be substituted as a party and the driver dismissed – even if that turns out to deprive the victim of compensation. See *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). Even for claims based on the Constitution, there may be rights without remedies. *FDIC v. Meyer*, 510 U.S. 471, 484-86, 114 S.Ct. 996, 1005-06, 127 L.Ed.2d 308 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983); *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). So too with § 2254(d)(1). Congress lacks power to revise the meaning of the Constitution or to require federal judges to "defer" to the interpretations reached by state courts. Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired. Regulating relief is a far cry from limiting the interpretive power of

the courts, however, and Congress has ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is deployed.

This distinction between rights and remedies is fundamental. Every day, courts decline to disturb judgments that they *know* are wrong. This is the principal function of the law of judgments. Suppose *A* and *B* are plaintiffs in the same lawsuit, which they lose; *A* appeals and wins, while *B* does not appeal. It has now been established that the judgment against *B* is wrong. May *B* file a new suit to obtain the benefit of *A*'s victory? The answer is "no." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The Full Faith and Credit Clause is designed to make this result a matter of constitutional entitlement. And although today we think of claim preclusion (res judicata) as a specialty of civil law, it is only in this century that courts have treated civil and criminal judgments differently. Recall the discussion in Part I.D above. See also *Felker*, ___ U.S. at ___, 116 S.Ct. at 2340; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 465-99 (1963) (tracing the history).

In suits under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), courts frequently rule for the defendant even though the plaintiff may be right on the merits. Public employees receive the benefit of the doubt on legal questions and must pay damages only when the legal right has been sufficiently well established and particularized that a reasonable official would have understood that what he is doing violates that right. See *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97

L.Ed.2d 523 (1987); *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir.1990) (en banc). Section 2254(d)(1) creates a related approach and is no less consistent with Article III. Even in criminal cases, courts sometimes enforce decisions they would not have made in the first instance. *Stone, Teague, Leon, Nix,* and the harmless-error cases, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), are among many illustrations of the gap between having a good legal argument and winning release from custody. *X* and *Y* are indicted for a joint crime. *X* pleads guilty; *Y* pleads double jeopardy and wins, whereupon *X* claims that his sentence is illegal and asks for relief. *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), holds that *X* must serve his sentence, because the plea of guilty waives even arguments that in retrospect are known to be correct.

Section 2254(d)(1)'s requirement that judges apply "Federal law, as determined by the Supreme Court of the United States", rather than their own understanding of the law, is consistent with the hierarchical nature of the federal judiciary. Judges of the inferior courts must implement the views of their superiors, from which it follows that many decisions of the lower courts will be inconsistent with the conclusions their judges would have reached, if unfettered by precedent. Applying, even predicting, the work of other judges, rather than reaching independent conclusions, makes up the bulk of the work of a federal judge – not only when interpreting the decisions of the Supreme Court, but also when deciding cases under the diversity jurisdiction, see *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and when

coping with federal law that is not uniform geographically, see *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126-27 (7th Cir.1993); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1544-48 (10th Cir.1996). See also *Lehman Brothers v. Schein*, 416 U.S. 386, 390-91, 94 S.Ct. 1741, 1743-44, 40 L.Ed.2d 215 (1974); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 17A *Federal Practice and Procedure* § 4248 (2d ed. 1988), discussing a circumstance under which a state court's decision is directly binding in federal litigation: the certification of a question of law to a state court. Article III does not establish a system under which judges of the inferior federal courts always must render judgment without regard to the conclusions of other courts.

Shortly before *Brown v. Allen* changed the rules, Learned Hand could write with confidence that

> upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights.

Schechtman v. Foster, 172 F.2d 339, 341 (2d Cir.1949). This expression of the longstanding distinction between unlawful *custody*, which supported a writ of habeas

corpus, and unlawful *procedure* in the course of a trial, which did not, reflected the law of the United States until 1953. Congress has elected to move back in that direction – but hardly very far, preserving independent federal review on pure questions of law, and subjecting mixed questions of law and fact to review for reasonableness. We would have to cast history to the winds to say that this decision, which respects fully-litigated judgments unless the state court has gone seriously wrong, transgresses constitutional limitations.

The American Bar Association's further argument (which Lindh joins) that the Due Process Clause of the Fifth Amendment protects § 2254 from amendment is unpersuasive. The ABA contends that because federal "courts traditionally have conducted a plenary review of [state] courts' ruling[s] on legal issues", the entitlement to such a review has become a "fundamental right" protected by the substantive component of due process analysis. To establish this "traditional" role, the ABA cites no case before *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935), a decision that is hardly pertinent. (*Norris* was not a collateral attack but arose on certiorari to a state court under what is now § 1257.) The summary of collateral review in Part I.D of this opinion, and Learned Hand's assessment of the state of the law in 1949, should disabuse any observer of the belief that plenary federal review of state criminal judgments is so firmly rooted in American tradition that any alteration has passed beyond legislative power. The Constitution contains an express limit on the power of Congress over the writ of habeas corpus – the Suspension Clause. It is not an appropriate exercise of the "judicial Power" to

supplement the Suspension Clause with a rule that enhancements of the 20th Century cannot be altered.

C

At last we reach Lindh's arguments about the restrictions the trial judge placed on his lawyer's cross-examination of Dr. Roberts. Lindh insists that he was entitled to cross-examine Roberts about the allegations of sexual misconduct in order to show, if not actual bias, a reason Roberts may have had to make his assessment more favorable to the prosecutor. Wisconsin replies with two arguments: first, that the decision is not "contrary to . . . clearly established Federal law" because the Supreme Court has never held that witnesses during the dispositional phase of bifurcated trials are subject to cross-examination; second, that if the Confrontation Clause applies, the decision to limit cross examination was not "an unreasonable application of" federal law, because under the Confrontation Clause "trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435.

Lindh rejoins that the first of these arguments is untenable because the Supreme Court of Wisconsin did not decide the case on that ground. Recall that the amended § 2254(d) begins by saying that a petition must not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings" unless

subsection (1) or (2) authorizes that step. Because the Supreme Court of Wisconsin addressed only the propriety of restricting the scope of cross-examination, it did not adjudicate on the merits the state's "claim" about the scope of the confrontation right. Lindh has this backwards. *Wisconsin* is not making any "claim" based on the Confrontation Clause. It is defending against Lindh's claim that the Confrontation Clause entitled him to cross-examine Roberts about the criminal investigation of the sexual-misconduct allegations. To prevail on this contention, Lindh must establish two propositions: that the Confrontation Clause applies at the dispositional phase of a bifurcated trial, and that the limitations on cross-examination were excessive. The Supreme Court of Wisconsin resolved this claim adversely to Lindh on the merits, by deciding the second proposition against him. Nothing in § 2254(d) calls on state courts to fill their opinions with discussions that by their lights are unnecessary, as the price of avoiding de novo review in federal court. There is a fundamental difference in federal practice between a "claim" and a legal theory. A "claim" is a demand for relief from an identified injury, which may be supported (or defeated) by many different theories. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 807-10, 108 S.Ct. 2166, 2173-75, 100 L.Ed.2d 811 (1988); *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.2d 223 (7th Cir.1993). The injury here is the restriction of cross-examination; the relief, a new trial. That claim has been resolved on the merits.

Lindh's contrary position would have especially unfortunate consequences when state law leads a state

court to bypass a particular legal theory. Suppose Wisconsin decides as a matter of its domestic law to extend the right of cross-examination to sentencing. A defendant then contends that he is entitled to cross-examine a given witness to uncover bias; the state's highest court disagrees on the ground that the potential for bias is too remote to justify what might be a lengthy line of questioning. If the defendant then seeks a writ of habeas corpus, a state should be entitled to reply that there is no "clearly established Federal law" creating any right of cross-examination in non-capital sentencing – indeed, that it is clearly established that there is none, see *Williams v. Oklahoma*, 358 U.S. 576, 584, 79 S.Ct. 421, 426, 3 L.Ed.2d 516 (1959); *Williams v. New York*, 337 U.S. 241, 249-50, 69 S.Ct. 1079, 1084-85, 93 L.Ed. 1337 (1949); *United States v. Wise*, 976 F.2d 393, 397 (8th Cir.1992) (en banc) – and that the state court's decision therefore cannot be "contrary to . . . clearly established Federal law". By Lindh's argument this response is impermissible, which could transmute a rule of state law (the extension of cross-examination to sentencing) into a rule of constitutional law, at least for purposes of that case. Yet one well established rule, not altered by the amendments, is that "[a] federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984). See also, e.g., *Gilmore v. Taylor*, 508 U.S. 333, 342, 344, 113 S.Ct. 2112, 2117-18, 2119, 124 L.Ed.2d 306 (1993); *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991); *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 948, 71 L.Ed.2d 78 (1982). If the Confrontation Clause

does not apply to a particular proceeding, then a mistaken restriction on the scope of cross-examination is nothing but an error of state law (which is how Justice Abrahamson's dissenting opinion approached Lindh's arguments). We therefore conclude that Wisconsin is entitled to make both of its arguments, and we turn to the first.

Starting from the premise that the Confrontation Clause is inapplicable to sentencing, Wisconsin contends that the dispositional phase of a bifurcated trial is more like sentencing than it is like the trial of the merits. At the first phase of Lindh's trial, the jury determined that he deliberately killed two people and tried to kill a third; he pleaded guilty to two other crimes. Having established all elements of the crimes beyond a reasonable doubt, Wisconsin contends, it was entitled to treat everything that followed as a matter of what should be done with the criminal – whether to imprison him (and, if so, where and for how long) or whether to "treat" him. As the state sees things, the two *Williams* cases necessarily establish that a person who provides evidence relevant only to disposition is not a "witness against" the defendant for purposes of the Confrontation Clause ("[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

Like questions about sentencing, the consequences of an insanity finding may be removed from the jury's purview. *Shannon v. United States*, 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994). Because "lack of mental disease" is not an element of the crimes under state law,

Wisconsin was free to decide that question by a preponderance of the evidence and even to assign the burden of persuasion to the defendant. A decision that Lindh was insane at the time of the shootings would not entitle him to release; it would only change the place of his confinement. The due process clause distinguishes prisons from mental institutions, see *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), but the Court held in that case that a state could choose to hold a criminal in a mental institution using the procedures for civil rather than criminal trials. And although an insanity finding would permit Lindh to seek release if he could later establish his recovery, this is not dramatically different from the opportunity to seek release from an indeterminate penal sentence on showing "rehabilitation," a feature of the federal sentencing system until the last decade and of some state systems even today. So the state submits.

Lindh does not have a decision of the Supreme Court clearly establishing that this line of argument is mistaken. Neither does he contend that the historical practice in criminal prosecutions exposed psychiatric testimony to cross-examination for bias even if the state bifurcated its proceedings. Instead he invokes a different set of analogies. If Wisconsin had established a unitary system, in which insanity was a defense on the merits (or in which sanity was an element of the offense), then Roberts plainly would have been a "witness against" him; and if a psychiatrist would have been a witness against the defendant in a unitary trial, how can bifurcation change things?, Lindh wonders. Perhaps one could respond that a chemist testifying at trial that a certain white powder is

cocaine is a witness against the defendant, but the same chemist testifying at sentencing about the same subject (to determine the quantity of the drug) is not; the contradiction is built into the Supreme Court's current jurisprudence.

Not prepared to concede that point, Lindh contends that *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), establishes that psychiatrists are "witnesses against" defendants even at sentencing. If that is correct, then *Specht* would "clearly establish" the lesser included proposition that defendants are entitled to cross-examine psychiatrists at the dispositional phase of a bifurcated trial. *Specht* actually stands for a different point, however: that if a state separates issues in such a way that the main trial does not establish all elements essential to imposition of the maximum punishment to which the defendant is exposed, the protections of the Confrontation Clause (and many other provisions) extend to ensuing proceedings, whether or not they are called "sentencing." Compare *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), with *Schiro v. Farley*, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994), and *Gray v. Netherland*, *supra*. Specht was convicted of "indecent liberties," a crime that in Colorado carried a 10-year maximum sentence. But he was sentenced under that state's Sex Offenders Act, which allowed the judge to impose an indeterminate term of one day to life on finding that the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." The Court held in *Specht* that psychiatric testimony bearing on these

issues was subject to cross-examination because it increased the maximum punishment beyond that set by law for the crime of conviction. As a practical matter, Colorado had made it a crime, punishable by life in prison, to be a mentally ill habitual sex offender. Wisconsin has not done anything of the kind. Murder is punishable by life in prison; the elements proved beyond a reasonable doubt at the first phase of Lindh's trial therefore authorize the punishment imposed on him. The dispositional phase offered Lindh the opportunity for mitigation, quite unlike proceedings under the Sex Offenders Act in Colorado.

It may well be that, when the Supreme Court finally considers the question at issue here, it will decide that all testimony bearing on the defendant's mental state, and its effect on his punishment, comes from a "witness against" the accused, and therefore must be subject to cross-examination, no matter how the state structures the trial and sentencing process. But it has not yet so held, and such a conclusion would be a nontrivial extension of current law. We think it impossible to say that "clearly established Federal law, as determined by the Supreme Court of the United States", entitled Lindh to cross-examine Roberts about the allegations of sexual misconduct with patients.

Lindh therefore has to demonstrate that the state court's decision "involved an unreasonable application of, clearly established Federal law". *Davis* and *Van Arsdall*, which demonstrate that the Confrontation Clause entitles defendants to cross-examine adverse witnesses to expose their bias to the jury, are equally clear that the proper scope of cross-examination is a matter of degree.

We quoted the pertinent language of *Van Arsdall* above. The Supreme Court of Wisconsin asked the *legally* correct question by inquiring whether the trial judge abused his discretion; this is exactly how *Van Arsdall* poses the issue. And the fact-specific answer cannot be called "unreasonable" even if it is wrong (as some members of this court who join this opinion believe). Roberts knew that prosecutors were investigating allegations made against him, but, by the time he filed his final report and testified, he also knew that the Dane County prosecutor was not in charge. He may have thought that the Milwaukee County prosecutor would reward aid to the Dane County prosecutor – but if Roberts thought that, he probably also believed that his many prior engagements as a prosecutorial expert would carry even more weight. Hindsight implies as much. The special prosecutor filed misdemeanor charges, to which Roberts pleaded guilty in January 1989. He was sentenced to probation without time in prison, and he agreed to surrender his medical license. The special prosecutor informed the sentencing judge of Roberts' many appearances as an expert witness over the course of his long career; Lindh's case was not singled out.

Nothing in the record shows that Roberts altered his views between his initial interview with Lindh (before any allegations of misconduct had come to light) and his testimony at trial. The possibility that Roberts altered his views – telling the prosecutors one thing orally at the outset of the case but offering another view, less favorable to Lindh, in the written report and on the stand –

was open to unfettered cross-examination. Lindh's counsel did not need to mention the sexual misconduct allegations to explore this question in depth. Under these circumstances, a reasonable and responsible judge might conclude that cross-examination based on the allegations that Roberts had sexual relations with three female patients would divert attention from the principal issue at hand – whether Lindh had a mental disease in January 1988 – without producing concrete evidence of bias. When a district judge comes to such a conclusion, a federal court of appeals will exercise deferential review, see *United States v. Hernandez*, 84 F.3d 931, 933-34 (7th Cir.1996), and will accord greater weight to thoughtfully reasoned decisions. Cf. *United States v. Beasley*, 809 F.2d 1273, 1278-79 (7th Cir.1987). *Hernandez* draws, for federal practice, a line similar to that of § 2254(d)(1): De novo appellate review for core legal issues, such as whether the Confrontation Clause applies, and deferential review for operational decisions within areas in which the constitutional norm allows discretion. Section 2254(d)(1) requires a federal court hearing a collateral attack to accord at least that much respect to the state courts.

The opinion of the Supreme Court of Wisconsin in Lindh's case is careful; it correctly states the holdings of *Davis* and *Van Arsdall*; it does not transgress any clearly established principles; instead it addresses a matter of degree about which thoughtful people can, and do, differ. Several portions of the opinion suggest that as a matter of state law the court was holding the trial judge to an even higher standard, which it thought satisfied. Lindh believes that the state court put too much weight on

objective factors (such as whether the Dane County prosecutor could reward favorable testimony) and not enough on subjective ones (such as the possibility that Roberts credited the Dane County prosecutor with more influence than he possessed, or was willing to exercise). By restricting in the new § 2254(d)(1) the scope of the extraordinary relief provided by the writ of habeas corpus, Congress has instructed the inferior federal courts to refrain from this sort of fine tuning. We hold accordingly that Lindh is not entitled to a writ of habeas corpus.

AFFIRMED.

DIANE P. WOOD, Circuit Judge, concurring in part and dissenting in part, with whom RIPPLE and ROVNER, Circuit Judges, join Part II.

This case underscores both the importance and the difficulty of the task with which courts are charged under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214, in applying the new substantive standards for the issuance of writs of habeas corpus in proceedings brought by state prisoners under 28 U.S.C. § 2254. Although I concur with most of the majority's analysis of the new law, I dissent from the way it has been applied here.

I

With one reservation, I concur in Part I of the majority's opinion, which holds that the amended version of § 2254 applies to Lindh's case. My reservation relates only to the ancillary decision to deny Lindh's motion to supplement the record in this court. See *ante*, at 867.

Lindh wanted to demonstrate that the record in the Wisconsin court reflected Dr. Leigh Roberts' suspension of privileges at the University of Wisconsin Hospitals by the time of the trial. This is not an effort to introduce new evidence in any sense of that term; it is only an effort to show us what was legitimately in the record before the Wisconsin courts. In my view, in light of the changes in the law that have occurred and the lack of prejudice to all concerned, we should grant that motion.

I am also in substantial agreement with Parts II.A and II.B of the majority's opinion, which hold that the amended version of § 2254(d)(1), construed properly, does not unconstitutionally trample on the Article III powers of the federal judiciary. In particular, I agree that nothing in the language of § 2254(d) requires the federal courts to "defer" to the legal determinations of the state courts, and therefore we need not confront the serious constitutional issues that would arise if the contrary were true. I begin to part company with the majority where it foreshadows its discussion in Part II.C of its opinion and suggests that we "need not shoulder the potentially difficult task of determining when an appellate gloss on a decision of the Supreme Court has so far departed from its wellsprings as to be the 'real' source of law. . . ." *Ante*, at 869. For better or for worse, that task will be ours in virtually every case that comes before us under the amended law, because it is rare indeed that we will see something identical in all particulars to a case already decided by the Supreme Court. However minor the factual variations, we both can and must look for guidance in our own decisions, decisions from other appellate

courts (federal and state), and persuasive secondary sources.

I also disagree with the majority's statement, *ante* at 870, that one ingredient of Lindh's claim is not well established. As I explain in more detail below, the majority's description of the Wisconsin scheme is incomplete, and is therefore potentially misleading. Whether the Wisconsin court labeled this phase "dispositional" in its opinion in *State v. Koput*, 142 Wis.2d 370, 418 N.W.2d 804 (1988), is not controlling as a matter of federal law. These are questions, however, that go to the application of amended § 2254(d), not to its compatibility with Article III.

Finally, in broad terms I agree with the majority's interpretation of the key components of § 2254(d)(1) and its explanation of the difference between something "contrary to" clearly established law and something that is an "unreasonable application of" such law. My concern is with a few statements that I fear could be misunderstood. For example, the majority states broadly that the "contrary to" language of § 2254(d) does not authorize issuance of a writ whenever a court errs. If all it means by that is that doctrines like harmless error continue to apply, then the statement is a harmless truism. If it were read to imply that prejudicial errors of law can be ignored, however, it would be wrong. The statute does authorize issuance of a writ, if the state court has committed a pure error of law. This is because the federal court has the power to decide whether the state court followed clearly established law as declared by the Supreme Court of the United States and because no deference is owed to

the state court's own views of that issue. The real problem is a familiar one (though no easier for being familiar): when is the issue purely one of law, and when is it a mixed question of law and fact. If the federal court concludes (*de novo*) that the state court has not made an error of law, then the question becomes whether there has been an unreasonable application of the law. This, I agree, is another way of describing the "mixed question of law and fact" situation. Unreasonableness makes sense as a standard here, if for no other reason than the deference that is owed to the state court's determination of the facts, see § 2254(e). The majority suggests that when the constitutional question is a matter of degree, rather than of concrete entitlements, the federal court must honor a "reasonable" decision by the state court. Most constitutional entitlements in the area of criminal procedure have elements of both: if a defendant's rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), have been violated with respect to part of the prosecutor's file, it is little comfort that the prosecutor turned over other *Brady* material; the same goes for Confrontation Clause rights of the sort we have here. Just because one can cross-examine a witness about prior inconsistent statements, for example, does not mean that cross-examination is unnecessary to show that the same witness had a plea bargain with the government. Many of these rights, in short, will not be matters of degree when we address them at the proper level of detail: the deprivation will be clear, and the federal court must decide whether the right was violated.

II

In order to explain why I disagree with the majority's resolution of Lindh's own case under the principles set forth in its opinion, it is necessary to supplement the statement of facts and the description of the procedures used in Wisconsin cases where a plea of not guilty by reason of mental disease or defect is entered.

Lindh went on his shooting rampage in the City-County Building in Madison, Wisconsin, on January 15, 1988. He himself was shot during the melee, was apprehended immediately, and was taken to the hospital under police custody. At 9:00 p.m. that evening, the district attorney's office contacted Dr. Roberts at his home and asked him to interview Lindh at the intensive care unit. Roberts agreed and promptly went to the hospital, arriving around 9:30 p.m. Lindh spoke with Roberts for some time, telling him about the circumstances preceding the murders and his feelings. Roberts elicited statements from Lindh indicating that he was not experiencing suicidal feelings, depression, hallucinations, or the like.

Lindh was arraigned in Dane County Circuit Court on February 26, 1988, and entered pleas of not guilty and not guilty by reason of mental disease. At that time, the court appointed Roberts and Dr. Frederick Fosdal, another forensic psychiatrist, to examine Lindh on behalf of the state. Shortly thereafter, Roberts learned that the University of Wisconsin Hospitals were investigating allegations that he had engaged in sexual misconduct with a female patient – allegations that he knew could lead to loss of his license and criminal penalties. In May

1988, the Medical Examining Board asked Roberts to provide it with records, revealing to Roberts that the Board, too, was concerned about these allegations.

In the meantime, Roberts continued to work on the Lindh case. On June 22, 1988, he interviewed Lindh again. The very next day, June 23, 1988, attorneys for the University of Wisconsin Hospitals referred the sexual misconduct allegations to the Dane County district attorney's office. Recognizing the potential for a conflict of interest, that office referred the case to a special prosecutor from the Milwaukee district attorney's office. Roberts learned of that appointment and of the criminal investigation on July 8, 1988. It was not until August 17, 1988, that Roberts first produced a written report on the case, which concluded that Lindh was not suffering from a mental disease or defect at the time of the shootings. On August 22, 1988, he interviewed Lindh a final time. Lindh alleges, as noted above, that the state trial court record shows that Roberts was suspended from the University Hospitals some time during the summer. Whatever the status of that allegation and his unsuccessful motion to supplement the record, it is clear that the state Medical Examining Board filed a civil complaint against him in August to take away his license, based on alleged sexual exploitation of three patients. Crucially, all these events transpired *before* the trial in Lindh's case.

On September 12, 1988, the state filed a motion *in limine* requesting that the trial court prohibit any cross-examination of Roberts concerning the allegations of misconduct pending against him or concerning any ramifications of those pending charges. Lindh opposed the motion, arguing that the circumstances raised serious

questions about Roberts' bias, motive, and interest. First, Roberts would present himself as a distinguished professional, and the jury might give less weight to his opinion if it knew that proceedings to revoke his license were pending. Second, defense counsel noted that University Hospitals had already suspended Roberts' privileges, which was important for the jury to know. Finally, Lindh argued that Roberts would have an incentive to please the prosecution, regardless of the technical fact that the particular prosecuting attorney was from Milwaukee rather than Madison. The case had received state-wide notoriety, and Roberts himself was a well-known expert witness. Unmoved by Lindh's arguments, the trial court granted the state's motion and found that evidence relating to the investigation of Roberts' misconduct was "totally irrelevant and immaterial."

When Roberts took the stand to offer his testimony, Lindh's worst fears were realized. During the initial presentation of his credentials, the jury learned that Roberts was a faculty member of the University of Wisconsin Medical School, that he was "on the adjunct faculty of the San Francisco Theological Seminary," that he had chaired conferences "in relation to religion and mental health," that about three years before he had been "honored . . . as essentially the mid-west psychiatrist of the year," and, on top of all that, that he was a loving grandfather with eight grandchildren "up to nearly the age of Mr. Lindh." Because of the trial court's ruling, the jury never learned that Roberts' affiliation with the University of Wisconsin was in peril, nor that he was about to lose the prestigious standing in the profession he had enjoyed up to that time. Worst of all, the jury never learned that Roberts might

have had a motive to favor the prosecution in his testimony.

As Wisconsin law requires in cases like Lindh's, there was a "continuous trial" in which the jury first considered the plea of not guilty, and, having concluded that Lindh was guilty, then considered his plea of not guilty by reason of mental disease or defect. See Wis. Stat. Ann. § 971.165(1)(a). The jury's one-sided picture of Roberts was particularly troubling because Roberts was the prosecution's star witness during the second (mental disease) stage of the proceedings. Emphasizing his superior ability to diagnose Lindh due to the contemporaneous interview he had conducted on the date of the shooting, Roberts testified that Lindh was not suffering from any psychosis at the time of the shootings and was fully capable of understanding the wrongfulness of his actions and conforming his behavior to the requirements of the law. The defense called Dr. Ezra Griffith, who testified that Lindh suffered from a mixed personality disorder and was in a brief reactive psychosis during the shootings. According to Griffith, Lindh was unable to appreciate the wrongfulness of his actions and conform his conduct to the law when he was in such a state. Finally, the other prosecution expert, Dr. Fosdal, offered an opinion somewhere in the middle: he agreed with Griffith that Lindh was suffering from a mixed personality disorder, but he disagreed that Lindh had experienced a brief reactive psychosis during the shootings. With this evidence before it, the jury found that Lindh was able to appreciate the wrongfulness of his conduct and to conform it to the law. See Wis. Stat. Ann. § 971.15(1). In

accordance with Wisconsin law, the judge therefore proceeded to the sentencing phase of the proceeding, see Wis. Stat. Ann. § 971.165(3)(a), and imposed a sentence of life in prison.

Wisconsin uses a three-phase proceeding in cases in which the mental responsibility of the defendant is at issue. A defendant is entitled to couple a plea of not guilty with a plea of not guilty by reason of mental disease or defect, pursuant to Wis. Stat. Ann. § 971.165(1). The statute establishes the order of proceedings for the two pleas as follows:

> (a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

Section 971.15(3), Wis. Stat. Ann., provides that "[m]ental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable degree of certainty by the greater weight of the credible evidence."

If the jury finds the defendant not guilty on the first plea, the court must enter a judgment of acquittal and discharge the defendant. § 971.165(1)(d). If, on the other hand, the jury finds the defendant guilty on the first plea, then the trial continues into phase two and the court withholds judgment pending the jury's determination on the second plea. *Id.* At the end of the second phase, the jury either finds that the defendant is not guilty by reason of mental disease or defect, or that the defendant is guilty (*i.e.* his affirmative defense fails). § 971.165(3). At that

point, the court either enters a judgment of "not guilty by reason of mental disease or defect," or it enters a judgment of conviction. *Id.* After the appropriate judgment is entered, the court concludes the proceedings with phase three, which is either a commitment hearing pursuant to § 971.17(2)(a) or a sentencing proceeding pursuant to §§ 972.13, 972.14, and 972.15. For those found not guilty by reason of mental disease or defect, the statute requires the court to commit the person to the department of health and social services for a specified period not exceeding two-thirds of the maximum term of imprisonment that could have been imposed, unless the maximum term of imprisonment is life, in which case the commitment period can also be life. § 971.17. As soon as six months after the person is committed, he is entitled to petition for conditional release. § 971.17(4)(a). He can continue filing these petitions once every six months. Importantly, the court "shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released." § 971.17(4)(e). A person who wins conditional release can then petition the court for termination of the order of commitment. § 971.17(5).

The Wisconsin Supreme Court discussed the predecessor statute to § 971.165 extensively in *State v. Koput*, supra, in which the principal issue was whether the jury verdict in phase two must be unanimous. It distinguished the responsibility phase of the bifurcated trial used in Wisconsin from the guilt/innocence phase, labeling it "a special proceeding in the criminal process in which the defendant has the burden of proof to establish his lack of

responsibility to a reasonable certainty by the greater weight of the credible evidence." 418 N.W.2d at 805. It rejected the public defender's arguments that the usual protections for a criminal trial, such as the need for a unanimous verdict by a jury of twelve, and the requirement of proof beyond a reasonable doubt, applied in the phase two proceeding. The affirmative defense tried during phase two related only to "responsibility," and had the effect of relieving the person of the sanctions for criminal conduct. The finding of guilt during phase one, however, is unaffected by phase two. For that reason, the Wisconsin Court concluded that phase two was "dispositional" in nature and that the jury rules for phase one were inapplicable. *Id.* at 812.

In its opinion in Lindh's case, the Wisconsin Supreme Court indicated that the Confrontation Clause of the Sixth Amendment, as well as its analog in Article I, section 7 of the Wisconsin Constitution, applies to the phase two proceeding. See *State v. Lindh*, 161 Wis.2d 324, 468 N.W.2d 168, 175 (1991). On one level, that is almost enough for us, because it tells us the significance Wisconsin attaches to this stage of the proceedings. But as an independent matter of federal law, the Wisconsin Supreme Court's conclusion is plainly correct. Clearly established law from the Supreme Court shows that nothing about the phase two proceeding would justify an exemption from the Confrontation Clause.

First, Wisconsin's practice of determining criminal responsibility in the second stage of a bifurcated trial, where the defendant has the burden of proof, is no different from many other state rules that the Supreme Court has approved that similarly shift the burden of proof. See,

e.g., Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (state may require accused to prove his insanity beyond a reasonable doubt); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (constitutional to require defendant to prove affirmative defense of extreme emotional disturbance in order to qualify for mitigating factor that reduced a charge to manslaughter); *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (constitutional to use "preponderance of the evidence" standard for the State's burden of proof at sentencing for minimum sentencing law); *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (constitutional for Ohio to require defendant to prove affirmative defense of self-defense by a preponderance, as long as instructions required prosecution to prove all elements of the offense of aggravated murder beyond a reasonable doubt). Thus, the Wisconsin Supreme Court was on firm ground in *Koput* when it found nothing objectionable about the use of a non-unanimous jury and a shift in the burden of proof for Wisconsin's criminal responsibility determination.

Second, no matter how for purposes of state law Wisconsin wishes to characterize phase two, it is clear that it is the definitive step that yields either a finding of criminal responsibility for the offense, and hence incarceration, or a finding of no criminal responsibility, and hence hospitalization for as little as six months or as much as a lifetime. The majority disregards the provisions of Wis. Stat. Ann. § 971.17 when it asserts, *ante* at 875, that the only consequence of a decision that Lindh was not criminally responsible would be to "change the place of his confinement." The majority dismisses the

possibility of release under § 971.17 as trivial, equating it to the chance of release under an indeterminate sentencing scheme. This position, however, overlooks both the critical features of the second phase of the Wisconsin proceeding and the defining characteristics of any sentencing proceeding.

It is undisputed that the second phase trial begins with a plea of "not guilty by reason of mental disease" and ends with a jury verdict of guilty or not guilty. Like all jury verdicts of guilty or not guilty, that is "dispositive" in the sense that it governs what kind of further proceedings will be required, but it is not "dispositive" in the same way a sentencing proceeding is. At the risk of stating the obvious, the purpose of a sentencing hearing is to pronounce the sentence, and the jury's phase two verdict does not even begin to address that subject. A sentence might be a fine or incarceration, or some combination of the two. It might include a period of probation or supervised release; construing the term broadly, it might even include commitment to a mental institution for a period of years. These issues are simply not before the court or the jury during the phase two trial in Wisconsin. Its sole purpose is instead to decide whether the person is criminally responsible, and hence will receive a criminal sentence, or if the person is not to be held responsible and instead is to receive involuntary commitment to a mental institution. (The latter, of course, occurs every day in contexts far removed from the criminal justice system.) The fact that the verdict of "guilty" from phase one stands does not distinguish this from many other situations – such as self-defense, heat of passion, or

justification – where it is clear that the defendant committed the criminal act, but he will not be punished for it. Furthermore, the analogy to parole or release under an indeterminate sentencing scheme does not hold up. No such system of which I am aware confers an *entitlement* on the defendant to win release unless the court finds by *clear and convincing evidence* that he must remain incarcerated. Yet this is exactly how the commitment rules in Wisconsin operate for individuals found not to be criminally responsible for their acts. See Wis. Stat. Ann. § 971.17(4)(d), (5).

The Supreme Court has always required application of the Confrontation Clause to proceedings that begin with a plea of not guilty and conclude with a finding of guilt or acquittal. *Cruz v. New York*, 481 U.S. 186, 190, 107 S.Ct. 1714, 1717, 95 L.Ed.2d 162 (1987) (for purposes of the Confrontation Clause, a witness against a defendant is anyone whose testimony "is part of the body of evidence that the jury may consider in assessing his guilt."); *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1067-68, 13 L.Ed.2d 923 (1965) (holding the right of confrontation applicable to the states under the Fourteenth Amendment). More than that, it has applied the Confrontation Clause to capital sentencing proceedings, where it is true that the only difference is in the nature of the sentence imposed (albeit an exceptionally important difference), explicitly recognizing the need for adversarial debate in such a context. See generally *Gardner v. Florida*, 430 U.S. 349, 360, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to

recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."). The plain fact here is that Lindh could, in the words of the Wisconsin Supreme Court, have been "relieve[d] . . . of the sanctions for criminal conduct" at the end of the phase two proceeding. See *Koput*, 418 N.W.2d at 812. It is no expansion of clearly established Supreme Court law to find here that stakes of this magnitude in the proceeding bring the Confrontation Clause into play, as the Wisconsin Supreme Court itself recognized.

Decisions of the Supreme Court of the United States also establish that Lindh's right to confront Roberts was impermissibly restricted, through the trial court's grant of the motion *in limine*. The two key cases, the majority agrees, are *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), and *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). In the 1974 *Davis* decision, the Supreme Court began with the observation that "[c]onfrontation means more than being allowed to confront the witness physically." 415 U.S. at 315, 94 S.Ct. at 1110. The main and essential purpose of confrontation is *"to secure for the opponent the opportunity of cross-examination." Id.* at 315-16, 94 S.Ct. at 1110 (emphasis in original). Cross-examination involves both the testing of the witness's story and impeachment or discrediting of the witness. As the *Davis* Court said, "[a] more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Id.* at 316, 94 S.Ct. at

1110. The Court held that counsel should have had the opportunity not only to ask the witness in question whether he was biased, but also to explore why he might have been biased or otherwise lacked impartiality.

The Court reiterated all these points in *Van Arsdall*. Notably for Lindh's case, it drew a distinction between trial court control of cross-examination to limit harassment, confusion, repetition, or the marginally relevant, and the prohibition of *all* inquiry into the possibility of a witness's bias. 475 U.S. at 679, 106 S.Ct. at 1435. It held that:

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." 475 U.S. at 680, 106 S.Ct. at 1436, quoting from *Davis v. Alaska*.

The particular risk of bias in *Van Arsdall* was quite similar to the type Lindh wished to put before the jury. The trial court in *Van Arsdall* prohibited inquiry into the terms of an agreement the witness had made with the prosecutor to drop a drunk driving charge in exchange for his testimony about the murder. There was nothing unusual or unprecedented in Lindh's effort to show that Roberts, too, might have been shading his testimony with the ulterior motive of securing better treatment from the state. Thus, Supreme Court decisions establish both that

the Confrontation Clause applies to the kind of proceeding we have here, and that the Confrontation Clause is violated when the defendant is precluded from exposing "possible biases, prejudices, or ulterior motives." *Davis*, 415 U.S. at 316, 94 S.Ct. at 1110.

The only question remaining is whether the Confrontation Clause was violated here, when the trial court precluded all inquiry into the proceedings at which Roberts risked loss of his professional license, obloquy from his peers, and criminal conviction. Both the Wisconsin Supreme Court and the majority here believe that the administrative transfer of the case from the Dane County prosecutor's office to the Milwaukee special prosecutor erased all possibility of concern from Roberts' mind. In my view, this asked the wrong question (*i.e.* was it sufficient when steps were taken to assure formal insulation of the Milwaukee prosecutor from the Dane County office), and thus produced the wrong answer. The focus must instead be on Roberts' motivations to shade his testimony, just as it was in *Van Arsdall*. It is worth recalling what had already happened to Roberts, before deciding whether the trial court erred in its total exclusion of the impeachment testimony. The two critical dates are July 8, 1988, and August 17, 1988. No later than July 8, 1988, Roberts knew that a criminal investigation of his activities was underway, with all that implied for his career. Yet it was not until August 17, 1988, as far as this record shows, that he first reduced his conclusions about Lindh to writing. The majority comments that there is no reason to believe Roberts changed his mind between the initial interview on the date of the shooting and August 17, but there is obviously no way to know if the trial

court forbade inquiry and cross-examination on the matter. (The majority suggests that Roberts was open to "unfettered cross-examination" on this issue, but that cannot be true given the fact that Lindh's counsel was forbidden to question Roberts on the one fact that might have led Roberts to change his mind: his legal problems, and his hope of winning favorable treatment from the prosecutors.) By the time the trial started, the state Medical Examining Board had also filed a civil complaint against Roberts to take away his license. Again, the jury knew nothing of this; instead, it was informed that he was "mid-west psychiatrist of the year."

Cross-examination on Roberts' legal difficulties was required for at least two reasons. First, when expert witnesses are proffered the jury is entitled to learn about their qualifications. See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Particularly in a field like psychiatry, where methodologies are not readily subject to the kind of objective scientific verification the Supreme Court called for in *Daubert*, the jury is entitled to evidence that will suggest what weight it should give to the expert's opinions. It is fanciful to assume that a jury would give the same weight to the "mid-west psychiatrist of the year" as it would give to someone who was facing both criminal charges and civil proceedings to revoke his license. Second, as Justice Abrahamson of the Wisconsin Supreme Court so ably demonstrated in her dissenting opinion, Roberts subjectively may have believed or hoped that a "good performance" on his part for the state might cause the prosecutor to treat him leniently. The fact that the prosecutor was called a "special prosecutor" for Dane County,

rather than a member of the usual staff, cannot have made any difference from Roberts' subjective viewpoint. The courts regularly see witnesses in criminal trials who face charges in multiple jurisdictions (federal and state, or several states or parts of states), and the witnesses are aware that their performance is being watched by all concerned. If a witness were testifying in a case before the Circuit Court of DuPage County, Illinois, and that witness were facing charges in Cook County, the State's Attorney would have no ground for keeping out cross-examination designed to show hope of favorable treatment at the hands of the Cook County authorities. Roberts' case is no different.

Indeed, the case is even stronger for finding that Roberts may have entertained such a hope. Not all criminal prosecutions – not even all murder prosecutions – receive state-wide publicity, but the Lindh case did. Roberts, who had testified by his own account all over the state, knew that he was known in Milwaukee, just as he was known in other parts of Wisconsin. He had every reason to begin his efforts for leniency on the witness stand in Lindh's case. (Although it is not relevant to the trial court's ruling on the motion *in limine* here, the record of the actual criminal sentencing that took place after Roberts was convicted on the charges shows that his expectations were well founded. Both the prosecutor and the judge expressed intense regret at having to sentence him to anything at all, given his outstanding service to the state over many years.)

Van Arsdall and *Davis* make clear that the trial court did not face an "all or nothing" option with respect to the proffered impeachment testimony. It was entitled to place

reasonable limits on it, to avoid having the jury distracted with Roberts' problems. The trial court could, for example, have permitted cross-examination about the existence of the pending charges and forbidden discussion of their basis, instructing the jury that the nature of the professional misconduct charges was not relevant. This, or other possible limitations, would have eliminated or minimized any risk of a salacious exploration of Roberts' sexual proclivities. The problem here, as in *Van Arsdall*, lay in the total exclusion of the evidence. It is impossible, given the absence of scientific validation of this kind of psychiatric diagnosis, to say that this error was harmless. The jury literally had to decide whose word it would accept: Roberts', Fosdal's, or Griffith's. We must recall that *only* Roberts testified both that Lindh had no personality disorder and that he was responsible at the time of the offense. The jury would have seen an entirely different picture if Roberts had been discredited, and it was left only with Fosdal, who agreed that Lindh had a personality disorder but who thought he was responsible at the time, and Griffith, who thought Lindh had the disorder and was not responsible for what he did. Lindh, recall, had only to persuade the jury by a preponderance of the evidence that he was suffering from a mental disease or defect and could not conform his actions to the law.

In my view, the adjudication of Lindh's claim in the Wisconsin courts resulted, in the words of § 2254(d)(1), in a decision that was contrary to clearly established federal law as determined by the Supreme Court of the United States. To the extent it might better be characterized as a mixed question of law and fact, the Wisconsin decision was an unreasonable application of clearly established

federal law. For the reasons I have explained, I would grant the writ of habeas corpus.

RIPPLE, Circuit Judge, with whom ROVNER, Circuit Judge, joins, dissenting.*

This case presents several issues involving the new amendments to section 2254 of the Judicial Code. Among those issues, the one of most enduring importance is whether the new section 2254(d) is compatible with the judicial role of the United States courts required by the Third Article of the Constitution. The problematic subsection, identified as such by the President in his approval of the legislation[1] and by legislators who favored and opposed the measure, forbids the issuance of a writ of habeas corpus unless the decision of the state court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

1.

Several rules of statutory construction are pertinent to our analysis. First, we must remember that the statute must be interpreted as a whole. The amended language therefore must be considered in relation to the unamended language. We must give every word of the statute a meaning. We cannot assume that Congress intended

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* Judge Ripple also joins Part II of Judge Wood's dissenting opinion.

[1] Statement of the President of the United States Upon Signing the Antiterrorism Bill, April 29, 1996, 1996 WL 203049 (White House).

certain words or phrases to have no force and effect. *See Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988). We also must attempt to interpret the statute in a manner that renders it constitutional. *See Johnson v. Robison*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 1165-66, 39 L.Ed.2d 389 (1974). In doing so, however, we must not give the statute a strained meaning that clearly was not the intent of Congress. *See, e.g., Seminole Tribe of Florida v. Florida*, ___ U.S. ___, ___ n. 9, 116 S.Ct. 1114, 1124 n. 9, 134 L.Ed.2d 252 (1996).

We turn briefly to another preliminary consideration. The text of the amended statute sets forth what can be characterized semantically as two separate requirements: (1) that the underlying state decision be contrary to or involve an unreasonable application of federal constitutional law; and (2) that the applicable federal constitutional law have been determined by the Supreme Court of the United States. Ease of presentation and discussion certainly suggests such a division and the majority adopts it as its analysis. In the paragraphs that follow, the same pattern will be followed as a preliminary matter. However, we must also remember that the structure of our analysis can, and indeed often does, predetermine the result. This two-pronged approach, helpful as it is in the presentation of the material, must be critically evaluated because, although it has the virtue of clarity, it may well not reveal the true operation and effect of the statute and therefore present a skewed model for final evaluation of the amendment's constitutionality.

Finally, it is important to note that, both before and after the amendment in question, the fundamental task of

the judiciary under this statute remains unchanged: Congress has given the federal courts, including this court, the task of determining whether a state prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254. Under the previous version of the statute, the federal court determined on its own the applicable federal constitutional standard. The new statute operates in a decidedly different manner. Having given the federal courts the jurisdiction to determine whether a person is being held in custody in violation of the Constitution and laws of the United States, Congress now has also mandated how the courts will determine the applicable constitutional standard.

2.

Under the new amendment, in ascertaining whether there has been a violation of the Constitution, the courts are restricted to the case law of the Supreme Court of the United States; they are not permitted to rely as well upon their own precedent. In short, Congress, although continuing to vest the federal courts with the authority to decide whether a person is being held in state custody in violation of the Constitution, has now specified that the judiciary is required to disregard the work product of one of its components, a source of law upon which the courts otherwise would rely in the adjudication of the case.

It is a "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected . . . as a permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S.Ct.

1401, 1410, 3 L.Ed.2d 5 (1958). As *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), made clear in the earliest days of the Republic, this obligation flows from the constitutionally imposed obligation of the courts to decide cases within their jurisdiction and to determine and apply the law necessary to adjudicate those cases.

In determining whether Congress has intruded impermissibly into the federal judicial function, we must, as the majority acknowledges, first determine, with specificity, the nature of the judicial power. There can be no disagreement with the basic proposition that the Constitution, in its very text, makes clear that, once created, the inferior federal courts share the judicial power with the "one Supreme Court" mentioned explicitly in the constitutional text. Nor can there be any disagreement that such power must be exercised in light of the "revisionary" jurisdiction of the Supreme Court. Beyond this point, however, it is difficult to determine the precise contours of the majority's concept of the federal judicial power. Despite its emphasis on the distinctive responsibility of an inferior court, it describes the role of that inferior court as simply placing a "gloss" on the work of the Supreme Court. If we are to understand the constitutional function that we are duty bound to protect, a far more carefully drawn description of its contours is indicated. It helps little to define it in the negative; it is obviously not the "agency relationship" that exists between the Chief Executive and the executive departments of the government.

The relationship and interreaction of the various levels of the judiciary in molding constitutional doctrine is the product of a carefully crafted balance of power

between the judiciary and the legislative branch. That balance of power is constitutionally based. Through its control of the appellate jurisdiction of the Supreme Court and the entire jurisdiction of the lower courts, Congress certainly can influence the development of the constitutional doctrine. However, just as there are limits on the constitutional authority of the judicial branch, so too there are limits on the power of Congress to dictate the process of decision-making within the judicial department with respect to the meaning of the Constitution. Although Congress has the authority to create and abolish the lower federal courts and to regulate their jurisdiction, it has no power to dictate how the content of the governing law will be determined within the judicial department. In the present jurisdictional structure ordained by Congress, it is the responsibility of the Supreme Court of the United States to regulate, principally through the doctrines of stare decisis and precedent, the jurisprudence of the lower federal courts. Control of the law making function of the lower federal courts, within the hierarchical nature of the judiciary, is therefore a matter within the province of the Supreme Court. The Supreme Court of the United States, with the authority to bring a court of appeals to doctrinal heal, determines the degree to which the lower courts ought to be permitted to engage in constitutional doctrinal development.

When a case comes before an inferior federal court in the normal course of its exercise of jurisdiction, it is the duty of that court to determine the constitutional question before it. The inferior courts have a clear responsibility to refine the basic constitutional principles

enunciated by the Supreme Court. The task is accomplished through the process of reasoned elaboration disciplined by the doctrines of stare decisis and precedent. The duty "to say what the law is" is a unitary one within the unitary judicial department created by the Constitution. *See Plaut v. Spendthrift Farm*, ___ U.S. ___, ___, 115 S.Ct. 1447, 1457, 131 L.Ed.2d 328 (1995) ("not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one Supreme Court' ") (emphasis in original). In performing that function, an inferior federal court is not free to determine the content of the Constitution without reference to the existing jurisprudence of the Supreme Court of the United States. It must decide the case, but it must decide it as it believes, after study of and reflection upon existing case law, the Supreme Court of the United States would decide it under the Constitution. *See Levine v. Heffernan*, 864 F.2d 457, 459 (7th Cir.1988), *cert. denied*, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989). The Supreme Court then determines, in due course, whether the doctrinal development will be short-lived or remain a long-term part of the fabric of the constitutional jurisprudence of the judicial department of government. One justice described the interrelationship of the work of the inferior and Supreme Court by explaining the Supreme Court's scrutiny of the work of the lower courts in these terms: "Across the screen each Term come the worries and concerns of the American people – high and low – presented in concrete, tangible form." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 175, 93 S.Ct. 408, 422, 34 L.Ed.2d 375 (1972) (Douglas, J., dissenting). The longevity of our constitutional jurisprudence is a matter that Congress can control only

through the initiation of the amendatory process or through the alteration of the jurisdictional scheme. Congress otherwise has no more right than we to determine those aspects of our jurisprudence that the Supreme Court will allow to endure.

In section 2254, Congress has given the district court the task of determining whether a person is being held in violation of the Constitution. To require the federal judiciary to hold that there is no constitutional violation simply because there is no case of the Supreme Court of the United States directly on point, is to deny it the right to refer to the corpus of jurisprudence to which it turns when it must "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *see also Wright v. West*, 505 U.S. 277, 305, 112 S.Ct. 2482, 2497, 120 L.Ed.2d 225 (1992) ("We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.") (O'Connor, J., concurring). The amended statute requires that we decide whether a person is in custody in violation of the Constitution without consulting the body of law that determines what the judicial department says the Constitution requires.[2]

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[2] The majority appears to sense the incongruity of its position when it seemingly acknowledges that such an intrusion into the federal judiciary's adjudicative function would not be permissible in the regular case or controversy but is acceptable in the case of habeas corpus. For the majority, a habeas corpus proceeding is somehow less of a constitutional case or controversy properly within the jurisdiction of the federal courts. Although this distinction is apparently crucial to its holding, the majority never discloses how or why the habeas jurisdiction of the federal courts somehow is different than other areas of the courts' jurisdiction. Although it is very clear

3.

Limiting the judicial function of determining the meaning of the Constitution to a scrutiny of the decisions of the Supreme Court is, in itself, a sufficient constitutional infirmity to vitiate the amended statute. An examination of the "second requirement," independent of the first, raises, however, substantial additional concerns about the amendment's effect on the constitutional integrity of the Third Branch.

The amended statute requires that, although the district court has the obligation under the statute to issue the writ when the person is held in violation of the federal Constitution, the court must accept as definitive an interpretation of the federal Constitution by the state court, if that interpretation is a reasonable view of the clear precedent of the Supreme Court. Assuming arguendo that a reference only to the clear precedent of the Supreme Court is constitutionally acceptable, even the decisions of the Supreme Court do not form the substantive rule of decision in granting or denying the writ unless the state court's decision is deemed unreasonable. Even if the Supreme Court's rendition of the Constitution is "clearly established," it becomes the rule of decision only if the state court's interpretation of the federal Constitution is deemed to be very different from that of the Supreme Court of the United States. Otherwise, the state's view of

---

that the Congress, having once enacted a cause of action and vested a tribunal with the authority to adjudicate cases arising under it, can no longer dictate the rule of decision for the resolution of cases under it, we are told – as a matter of ipse dixit – that the situation is different with habeas.

the Constitution, not the Supreme Court's view, is operative.

Cast in its best light, this argument, at bottom, characterizes the restriction contained in the amendment as one of remedy: Congress simply has determined that the writ is to be available to state prisoners only when the state court's departure from the federal norm had been "unreasonable." Habeas relief is to be limited to those instances in which the degree of departure from the federal standard is so great as to have worked a gross deprivation of federal protection. This argument can be best evaluated by examining the support that the majority offers for this characterization. In its attempt to justify this approach, the majority points to other instances in which, despite the existence of a constitutional violation, plenary relief may not be available to an aggrieved individual. At first glance, these instances present seductive analogues to the present situation. Upon closer scrutiny, however, it is clear that in none of these instances is the federal court deprived of its essential responsibility and prerogative to define the meaning of the federal Constitution and to apply it to the case before it. Therefore these superficial comparisons provide no support for the statute under review in the present case.

There are several instances in which federal courts, although both declaring and applying the Constitution of the United States, place significant limitations on the available remedy. For example, in adjudicating a civil rights matter under section 1983, a federal court determines the applicable federal constitutional rule and applies it to the case before it. Its view, not the view of

any other sovereign, determines the applicable constitutional standard. Nevertheless, if a violation of a substantive constitutional standard is identified, the available remedy will vary depending on the circumstances.[3] So too, in our Fourth Amendment jurisprudence, the legality of the search always remains a matter of federal constitutional law, although the remedy of the exclusionary rule is inapplicable when the law enforcement officer reasonably relied upon a judicially issued search warrant. See *United States v. Leon*, 468 U.S. 897, 925, 104 S.Ct. 3405, 3422, 82 L.Ed.2d 677 (1984).

In the area of habeas corpus, the same pattern is evident. *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), simply holds that violations of the Fourth Amendment are not cognizable on habeas review because the violation does not affect the truth-finding process that is the principal focus of habeas relief. There is no deprivation of either the law declaring function or the adjudicatory function of the federal courts. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), likewise leaves intact the essential functions of the adjudicatory process. The case is adjudicated by the federal

[3] For instance, although a state official's conduct may be determined to have violated a prevailing constitutional standard, the official may be held to enjoy absolute immunity, *see Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (holding that a judge enjoys absolute immunity for judicial acts within his jurisdiction), or qualified immunity, *see Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 1095-96, 89 L.Ed.2d 271 (1986) (stating that qualified immunity for executive officials – state or federal – is the norm), from a damages remedy, although not from a prospective equitable remedy.

court on the basis of federal law. The rules of retroactive application of new developments are adjusted to take into account the nature of habeas relief.[4] It is not accurate, therefore, to term this amendment a mere extension of the principle of *Teague*. There is a qualitative difference – a constitutional difference – between fixing the time frame at which federal law will be applied and requiring that the federal court defer to any application of constitutional principle that cannot be characterized as unreasonable. Under the latter approach, mandated by the amended statute, the federal court must be content with a careful application of the Constitution, even if it is wrong. In essence, the federal court is free to have its own opinion of what federal law requires, but it must grant or deny the writ on the basis of another non-federal tribunal's view. Federal courts, however, must not merely expound on the cases before them; they must decide them. *Plaut*, ___ U.S. at ___, 115 S.Ct. at 1453. The judicial power is the authority, and the obligation, to adjudicate the case. Adjudication involves more than just the opportunity to declare the content and meaning of the law; it also involves the authority to apply that law as well.

4.

The magnitude of the deprivation worked on the judicial function can best be appreciated, however, by

[4] *Teague*, 489 U.S. at 309, 109 S.Ct. at 1074 (noting that in the habeas review context, "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system").

assessing the impact of the two phrases of the amendment together. Under the new scheme, the only permissible reference to federal constitutional law is to clearly established Supreme Court precedent. That precedent becomes the rule of decision with respect to the issuance of the writ only if the state court reaches an unreasonable view. When we pause to reflect on the role of the Supreme Court of the United States in constitutional adjudication and on the majority's view as to how reasonableness is to be measured, it becomes clear that any suggestion that a federal rule of decision will be applied to adjudications under section 2254 is illusory.

First, it must be remembered that it has never been the role of the Supreme Court of the United States to micro-manage the development of federal constitutional jurisprudence. From the days of the Great Chief Justice in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1818) – "[W]e must never forget that it is *a constitution* we are expounding" – to Congress' ratification of that role in the latest reassessment of the certiorari statute, see 28 U.S.C. § 1254 (1994), the Supreme Court's function has been to set, at a significantly broad level of generality, the guiding principles of our constitutional jurisprudence. Further application of those principles has been the work of the lower federal courts under the scrutiny of the Supreme Court.

In state criminal proceedings, these general principles must be applied, in the first instance, by the state courts. *See* U.S. Const. Art. VI. On habeas review, the majority holds that it is not simply a matter of the lower federal court's giving respectful heed to the interpretation of the federal constitution rendered by the state

court. Rather, the lower federal court must accept as the federal rule of decision the state court's view as preferable to its own. Moreover, given the broad level of generality at which the Supreme Court usually articulates the general principles of constitutional criminal procedure, the difference between the views of the federal and state court may indeed be substantial. Nevertheless, the majority tells us that these issues are "[q]uestions of degree" and that a reasonable decision of the state court must be honored. "Questions of degree" are subjects "painted in shades of grey, rather than in contrasting colors. . . . " This statement stands in stark contrast to the Supreme Court's own description of "contrasting colors" in *Estin v. Estin*, 334 U.S. 541, 545, 68 S.Ct. 1213, 1216, 92 L.Ed. 1561 (1948): "there are few areas of the law in black and white. The greys are dominant and even between them the shades are innumerable. For the eternal problem of the law is one of making accommodation between conflicting interests." The majority requires deference on all questions of degree. Yet, as the Supreme Court itself reminded us in *Estin*, discerning among the shades of grey is the essence of the adjudicatory function. *See Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985) ("But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination."). By suggesting that the amendment deprives the federal district court of responsibility for all questions of degree; the majority points graphically to why the amendment does not leave intact the integrity of the Third Branch: it deprives the

federal court not only of its prerogative to determine the content of federal law, but also of its right and duty to apply that law to the case before it.

As the Supreme Court has reaffirmed "time and again," the Constitution assigns to each of the three coordinate branches their own responsibilities and vests in each their own powers. *Morrison v. Olson*, 487 U.S. 654, 693, 108 S.Ct. 2597, 2620, 101 L.Ed.2d 569 (1988). And although the Supreme Court has rejected the formalist view that there is to be no "control or coercive influence,"[5] exerted by one branch over another, if one branch, through its actions, "unduly interfere[s]" with the role of another, such actions are void. *Morrison*, 487 U.S. at 693, 108 S.Ct. at 2620. In making this determination of "whether an Act [of Congress] disrupts the proper balance between the coordinate branches," we are to focus "on the extent to which it prevents . . . [another] Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443, 97 S.Ct. at 2790. The amended statute significantly "interfere[s]" with the judicial role and to a great extent prevents the judicial department from accomplishing its "constitutionally assigned functions." Simply put, the statute, as amended, deprives a federal court of the right to adjudicate the case. And a court that does not adjudicate advises: a role decidedly different than the one the Constitution envisions for courts and judges of the Third Article.

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[5] *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441-42, 97 S.Ct. 2777, 2789, 53 L.Ed.2d 867 (1977) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935)).

SUPREME COURT OF THE UNITED STATES

No. 96-6298

Aaron Lindh,

Petitioner

v.

James P. Murphy, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply.

January 10, 1997

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(6)

Supreme Court, U.S.
FILED
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No. 96-6298

In The

Supreme Court of the United States

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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QUESTIONS PRESENTED

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") on April 24, 1996. The Act's habeas corpus title, *inter alia*, amends 28 U.S.C. § 2254(d). The questions on which the Court granted review are:

I.

Whether the court of appeals correctly concluded that Congress, despite an explicit provision in § 107(c) of the Act, failed to specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases?

II.

If so, whether the court of appeals correctly supplanted this Court's antiretroactivity presumption, triggered by new legal consequences attached to completed events, with a presumption that habeas-curtailing statutes apply retroactively and with a test for retroactive effects that requires proof of actual reliance?

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The court of appeals' decision is reported at 96 F.3d 856 (7th Cir. 1996), and reproduced in the Joint Appendix (JA) at 153. The district court's unpublished opinion is in JA 141. The Wisconsin Supreme Court's decision (468 N.W.2d 168) and the Wisconsin Court of Appeals' decision (457 N.W.2d 564) are in JA 87, 71.

JURISDICTION

The court of appeals entered judgment on September 12, 1996. A petition for a writ of certiorari was filed on October 10, 1996, and granted in part on January 10, 1997. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. §§ 2241-2266, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, and § 107(c) of the Act, which are reproduced in Appendix I *infra*.

STATEMENT OF THE CASE

The Court's grant of certiorari on January 10 was limited to the first question presented in Aaron Lindh's petition: whether § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 applies to cases pending when the Act became law on April 24, 1996. The Court has deferred a second question: whether the court of appeals interpreted § 2254(d) consistently with its terms and the Constitution. JA 233. The following facts and prior proceedings pertain to the question now before the Court.

A. Statement of Facts

At noon on January 15, 1988, Mr. Lindh left a meeting with City Police Department officials in the City-County Building in Madison, Wisconsin and went to his car. Upset at the City Police Department's failure to solve two burglaries at

his apartment, Lindh took a rifle from the car, went back into the Building to the offices of the Dane County Sheriff's Department (with which he had no quarrel) and began shooting people he had never met. Two persons died; a third was wounded. Lindh then pointed his rifle at an armed deputy sheriff and advanced, shouting "Shoot me! Kill me!" The deputy shot him. JA 72, 89-90, 92.

That evening, Dr. Leigh Roberts, a forensic psychiatrist engaged by the state to meet Lindh's anticipated insanity defense, interviewed Lindh in the intensive care unit. Roberts later filed a report with the prosecutor concluding that Lindh had no mental disease at the time of the shootings. Roberts' conclusion was the mainstay of the state's case at trial, where Lindh's sanity was the sole contested issue. JA 73-78, 84-85.[1]

Six weeks after being retained on Lindh's case, Dr. Roberts learned that a patient had charged him with having sexual relations with her during treatment sessions, a felony under state law. Two months later Roberts learned that the Wisconsin Medical Examining Board was investigating allegations that he had sexually exploited three patients. A month later, University of Wisconsin Hospital officials referred the patients' allegations against Roberts to the District Attorney for investigation of felony charges. JA 76-77.

Professing to avoid a "conflict of interest," the D.A. elected to continue employing Roberts on Lindh's case and refer the charges against him to another prosecutor. About a month after the D.A. told Roberts of the Hospital's charges and the D.A.'s referral of them, Roberts filed his report with the D.A. finding Lindh free of mental disease. JA 34-35, 77.

After the Examining Board's effort to suspend Roberts' license became public, the D.A. filed a motion to forbid cross-examination of Roberts concerning "any possible ramifications of the [criminal] allegations" against him including his suspension by the University Hospital. Over objection, the

[1] A psychiatrist appointed by the court and one retained by the defense testified that Lindh was suffering from a mental disorder at the time of the shootings. JA 14-15, 77-78, 79, 99-100.

trial court granted the motion. JA 10-13, 19-36, 77. Accepting Roberts' view that Lindh was not suffering from a mental disease, the jury found him guilty of two counts of first-degree murder and one of attempted first-degree murder. Lindh was sentenced to two life terms plus 35 years. JA 89, 153.[2]

B. Direct Appeal and District Court Proceedings

The Wisconsin Court of Appeals reversed the convictions, concluding that jurors informed that Roberts was himself under criminal investigation might reasonably have discounted his testimony as biased in the state's favor. JA 84. A divided Wisconsin Supreme Court reversed, finding no Sixth Amendment Confrontation Clause violation. JA 87.

Lindh did not seek certiorari or state postconviction relief. Instead, on July 9, 1992, he filed a federal habeas petition presenting the confrontation claim. JA 1. The state answered but declined to file the trial transcript. JA 141-42. Mr. Lindh moved to compel production of the transcript and to set a briefing schedule. JA 45-47. The state asked the court to defer ordering a transcript and accept briefs on an argument that it had not raised in the Wisconsin courts: that the Confrontation Clause did not apply to Wisconsin's procedure for adjudicating sanity at trial. JA 48. On September 22, 1992, Lindh asked the court to order the transcript or take briefs on the state's new argument. JA 51-53.

For the next 18 months, nothing happened, aside from Mr. Lindh's filing three letters requesting prompt action. JA 60-66. Two days after Lindh's third letter, on March 4, 1994, the district court ordered briefs on the Sixth Amendment's application to the sanity phase. Briefs were timely filed by early May. JA 1, 67.

[2] Three months after Lindh's trial, Roberts pled guilty to one count of sexual exploitation. On the state's recommendation, the judge spared Roberts any jail time or fine, citing his work on behalf of prosecuting authorities throughout the State of Wisconsin as a forensic psychiatrist. JA 197, 217.

For the next 17 months, nothing happened, except more correspondence from Lindh seeking a prompt ruling. JA 69-70. On October 4, 1995, the district court denied the petition, declining to order a transcript or address the issue the parties had briefed. It held that the Sixth Amendment permitted disallowance of cross-examination about Roberts' potential bias based on past or hoped-for prosecutorial favors relating to his own criminal travails. JA 141-51.

Mr. Lindh appealed, arguing his case to a panel on April 9, 1996. The 1996 Act became law two weeks later. The court of appeals *sua sponte* then announced that it would take the case *en banc* and directed the parties to file briefs on the effect of amended § 2254(d) upon Lindh's pending case. JA 155-56. By a vote of 8-3, the Court held that the new § 2254(d) applied and barred relief.[3] JA 199, 219.

C. The Decision Below

1. Section 2254(d)'s applicability – statutory intent

The court of appeals first addressed Mr. Lindh's argument that amended § 2254(d) does not apply to his long-pending petition because § 107(c) of the Act expressly designates the class of "cases pending on . . . the date of enactment of this Act" to which its habeas amendments do apply – specifically, capital cases in "opt-in" jurisdictions – and

[3] Prior to the *en banc* order, the state had not claimed that § 2254(d) applied to Lindh's case. When the state thereafter argued that § 2254(d) applied and substantially altered the standard for relief, Lindh moved to supplement the record with evidence documenting the claims he would have made in state postconviction proceedings in 1992, in lieu of a federal habeas petition, had he known that his habeas remedy was limited in the manner the state now proposed. The court of appeals (over dissent) denied the motion to supplement the record because it was made "only . . . after the case had been set for rehearing en banc." JA 171, 199-200.

Lindh's case is not within that category.[4] The court ruled that § 107(c) creates "at most a negative implication" of congressional intent. It declined to draw that implication rather than the possible "competing inference . . . that Congress could not agree on an effective-date provision for the amendments [that include § 2254(d)]" or "overlooked" the matter. JA 158.

The court also rejected Lindh's observation that the application of amended § 2254(d) to all pending cases would render newly enacted § 2264(b) inexplicable, because the sole apparent function of the latter provision is to incorporate certain amendments of § 2254 – subsections (d) and (e) – into the set of provisions that § 107(c) makes applicable to "pending" opt-in cases.[5] To avoid this reasoning, the court interpreted § 2264(b) as establishing (by negative implication) that *none* of the Act's amendments of § 2254 or other preexisting habeas provisions *except* §§ 2254(d) and (e) apply to *any* capital opt-in cases, whether filed before *or* after the Act's enactment.[6] JA 159-61.

[4] The habeas title of the Act amends Chapter 153 of the Judicial Code (which includes § 2254 and most other preexisting statutes relating to the writ) and adds a new Chapter 154 (which enacts special provisions governing capital cases in states that "opt-in" by meeting specified procedural requirements). Section 107(c) makes the opt-in provisions of the Act but no others (except insofar as they are incorporated by the opt-in provisions) applicable to "cases pending . . . on the date of enactment."

[5] Because §§ 2254(d) and (e), as amended by Chapter 153, apply to all habeas actions governed by the new statute, there is no reason for § 2264(b) to incorporate those provisions into Chapter 154 unless the Chapter 153 modifications do not independently apply to pending cases and so had to be incorporated into Chapter 154 to make their important revisions applicable to pending "opt-in" cases via § 107(c).

[6] In addition to amended §§ 2254(d) and (e), Chapter 153 includes the exhaustion of remedies requirement (28 U.S.C. § 2254(b), as amended), restrictions on successive petitions (*id.* § 2244(b), as amended); and limitations on appeals (*id.* § 2253, as amended). The court of appeals read § 2264(b) to deny "opt-in" states the benefit of all these provisions.

2. Section 2254(d)'s applicability – retroactivity

The court then held that applying the new § 2254(d) to Lindh's case would not have a "retroactive" effect within *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994). The court gave two reasons why § 2254(d)'s application to pending cases could be held to fall outside the "definition of retroactivity."[7] First, it circumscribed *Landgraf*'s presumption against applying a statute that "attaches new legal consequences to events completed before its enactment." *Id.* at 270. Disagreeing with two other circuits, the court held that any effects of amended § 2254(d) that would "reduce [Lindh's] chance of prevailing" from what it was when he filed his petition "will not do" as a new consequence under *Landgraf*. JA 162, 168. Although § 2254(d) imposes significant new "limits on the granting of the . . . relief provided by the writ of habeas corpus," this "does not attach new legal consequences to the filing of [habeas] petitions." JA 177, 162. The only completed events to which new consequences attach that bring the *Landgraf* presumption into play are particular actions that Lindh can prove he took in "reliance on the prior state of the law." JA 170.

The court held that "Lindh lacks any reliance interest nearly that strong." *Id.* Apprehension of a lowered chance of relief in federal habeas would not have affected his decision to forgo state postconviction or certiorari proceedings because (1) the rule of *State v. Escalona-Naranjo*, 517 N.W.2d 157 (Wis. 1994), forbids state collateral attack absent an "unusual reason," which Lindh does not have " – and, if he does, the state courts remain open to him"; and (2) Lindh's case does not present "an abstract legal question" but a claim that the state courts misapplied settled law to the facts, so he "had no prospect in 1991 of receiving an audience in the Supreme Court" and "gave up nothing" by not seeking certiorari. JA 171. In response to the argument that this Court

[7] The court also said that § 2254(d) "affects the relation between federal and state courts, rather than regulating the details of the litigation, [so] the date on which the petition was filed" is unimportant. JA 163.

exercises its certiorari power with advertence to the availability *vel non* of habeas review, the court of appeals limited Lindh to his own behavior; he "cannot successfully argue that the change of law [would have] affected the judicial process." JA 164.

A second reason for declining to find retroactive effect was that "legal changes that reduce the willingness of federal courts to set aside judgments presumptively apply to existing judgments." JA 166. As evidence of a "consistent[ ]" "historical practice" reflecting this presumption, the court cited *Felker v. Turpin*, 116 S.Ct. 2333 (1996); two 1950 decisions of this Court applying the exhaustion of remedies doctrine in cases commenced before the doctrine's codification in 1948; two 1968 decisions citing the 1966 habeas amendments in cases filed before their adoption; and § 2254(d)'s language – the writ " 'shall not be granted unless . . . ' " – which "is prospective." JA 166-67.

3. Section 2254(d)'s interpretation

The court of appeals next construed the central provision of amended § 2254(d) barring relief on constitutional claims adjudicated in state court unless the state "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. . . . " JA 175. Mr. Lindh fundamentally disagrees with the court's construction, which defies § 2254(d)'s plain words, Article III and the Suspension Clause. Although for current purposes, Mr. Lindh must "assume that . . . the Court of Appeals properly applied the law," *Landgraf*, 511 U.S. at 250, he does so only *arguendo* in order to inquire whether, if the court's interpretation were applied to his case, it would " 'take[ ] away or impair[ ] vested rights acquired under existing laws, or create[ ] a new obligation, impose[ ] a new duty, or attach[ ] a new disability, in respect to transactions or considerations already past.' " *Id.* at 269. That inquiry requires a summary of the court's construction of § 2254(d).

Conceding that "Congress lacks power to . . . require federal judges to 'defer' to the interpretations reached by

state courts," the court below asked whether § 2254(d) "tell[s] us to 'defer' to state decisions." JA 185, 175. Because "the word 'deference' does not appear in the statute" – and federal deference to state "jurisdictions bound by [the Supremacy Clause] is not sensible" – the court held that the statute does not require it. JA 176. "The first phrase of § 2254(d)(1) – authorizing a federal court to issue the writ when the state court's decision is 'contrary to . . . clearly established Federal law, as determined by the Supreme Court . . . ' preserves . . . federal courts' independent interpretive power." *Id.*

The court declined, however, to "read the 'contrary to . . . law' language to authorize issuance of a writ whenever a [state] court errs." JA 179. "[W]hen the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts – when it is, in the standard phrase, a 'mixed question of law and fact' – § 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects 'an unreasonable application' of the law." JA 180. Because mixed questions are ones "of degree," "painted in shades of grey, rather than in contrasting colors, a responsible thoughtful answer reached after a full opportunity to litigate is adequate. . . . " JA 182. In mixed-question cases, that is, § 2254(d) "tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called 'unreasonable.' " JA 180-81.

The court summed up the "line" separating review under § 2254(d)'s "decision contrary to law" phrase and its "unreasonable application" phrase as "[d]e novo . . . review for core legal issues such as whether the Confrontation Clause applies, and deferential review for operational decisions within areas in which the constitutional norm allows discretion." JA 198.

Applying this interpretation to Mr. Lindh's case, the court held that the Wisconsin Supreme Court decision was not "contrary to . . . clearly established Federal law" because the "opinion . . . correctly states the holdings" of this Court's Confrontation Clause decisions. *Id.* And the state court's application of those decisions to the facts was not "unreasonable" because, under the majority's reading of those cases, if

the trial judge allowed cross-examination of any sort aimed at showing that Roberts was not telling the truth, the judge had discretion to completely bar cross-examination into any specific motive to lie. JA 197-98. This being only a question of "degree," the state court's "fact-specific answer cannot be called 'unreasonable' even if it is wrong (as some members of this court who join this opinion believe)." JA 196-97.

SUMMARY OF THE ARGUMENT

The question of the applicability of newly enacted 28 U.S.C. § 2254(d) to pending cases has two identical answers, one supplied by Congress, the other added – if need be – by the "judicial default rules" of *Landgraf v. USI Film Products*.

One, Congress accepted the responsibility that *Landgraf* sought to cultivate in the Legislative Branch in the first instance: it addressed the question of the temporal reach of the Habeas Corpus Title of the 1996 Act in two controlling provisions. In one – § 107(c) of the Act – Congress directly designated those habeas revisions that are applicable to "cases pending on . . . the date of enactment of this Act" and those that are not. Then, in a second provision – 28 U.S.C. § 2264(b) – Congress fine-tuned the consequences of the basic determinations regarding retroactivity that it had prescribed by § 107(c): it specified that two of the Act's revisions, which would otherwise have been inapplicable to any "cases pending," nevertheless *do* apply to certain pending cases. Thus, Congress has clearly spoken. The arguments to the contrary are that Congress may not have understood what it was saying and may have meant to leave the matter to judicial determination after all. If such arguments can be made against this statutory text, they can be made to undercut any statutory text; and their acceptance would leave no practical haven from judicial second-guessing of the fundamentally legislative policy judgments involved in fixing boundaries of a new statute's proper scope.

Two, should the Court look past the decisive statutory text, *Landgraf*'s authoritative default rules for judicial retroactivity decisions would preclude the application of the 1996

amendments of § 2254(d) – particularly as those amendments were interpreted by the court below – to habeas cases pending on the date of enactment. *Landgraf*'s own reasoning and the two hundred years of precedents which inform it unmistakably establish that the traditional presumption against statutory retroactivity is triggered by the "new legal consequences" that any such application of § 2254(d) would attach to completed events; and nothing – literally nothing – can be brought forward to overcome the presumption in this case. The court of appeals avoided the presumption by invoking two supposed counter-principles that legally do not exist and never have.

ARGUMENT

I. Introduction

The question presented is whether a single provision of the 1996 Act – 28 U.S.C. § 2254(d) – applies to this action, filed 45 months before the amendment became law. In Part II we show that the Act itself answers this question by specifying the habeas provisions that "shall apply to cases pending on . . . the date of enactment of th[e] Act" and omitting § 2254(d) from the list. Act, § 107(c). In Part III we show that, even if the Act's words were not dispositive, this Court's decision in *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994), would forbid the application of the court of appeals' interpretation of § 2254(d) to Lindh's case because that would attach radical new legal consequences to events completed before the statute was law.[8] Preliminarily, in this Part we describe the extreme effect of the lower court's interpretation on habeas cases such as this, then summarize *Landgraf*'s standard for deciding whether a new law applies to pending cases.

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[8] We assume the validity of the court of appeals' interpretation of § 2254(d) only *arguendo*, in keeping with the Court's decision to proceed initially with the "applicability" question. See pp. 1, 7 *supra*; note 19 *infra*.

A. The Effect of Section 2254(d) as Interpreted Below

A key provision of amended § 2254(d) permits habeas relief from unconstitutional confinement if the state "decision [upholding the confinement] was contrary to . . . clearly established Federal law as determined by the Supreme Court."[9] The court below construed the provision as forbidding relief unless a state decision applying the Constitution to the facts is not merely "wrong" under the legal standards clearly established by this Court's precedents but so grossly wrong as to be "unreasonable." Under that construction, Congress empowered federal judges to review state court decisions for consistency with the Constitution but required them to leave the decision of a case like Lindh's in force and effect although it decrees a result at odds with the supreme law of the land. The novel consequences of such a construction were applied retroactively to Lindh's four-year-old petition despite manifest congressional intention *not* to affect previously filed cases of this type and despite the *Landgraf* presumption against retroactivity, which was converted below into a presumption *of* retroactivity and a rule about reliance.

These conclusions conflict with those of most federal courts that have considered § 2254(d)'s applicability to pending cases[10] and with venerable notions about the prospectivity of new law. To see why, it is necessary to consider both "the

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[9] 28 U.S.C. § 2254(d)(1) (habeas application "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

[10] See *e.g.*, *Jeffries v. Wood*, 1996 WL 730493, at *1 (9th Cir. Dec. 20, 1996); *Boria v. Keane*, 90 F.3d 36, 37-38 (2d Cir. 1996); *Edens v. Hannigan*, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996); *Satcher v. Netherland*, 944 F.Supp. 1222, 1247-48 & n.15 (E.D. Va. 1996) ("overwhelming majority of federal courts . . . have held that the Chapter 153 Amendments [including § 2254(d)] are not applicable to pending [noncapital] petitions" (citing cases)). But see *Drinkard v. Johnson*, 97 F.3d 751, 765-66 (5th Cir. 1996).

nature and [the] extent of the change in the law" that the court of appeals' interpretation produces. *Landgraf*, 511 U.S. at 270. The *nature* of that change is to alter the habeas cause of action – to "adjust the circumstances under which the remedy of the writ of habeas corpus is deployed" and "prescribe limits on the granting of the . . . writ." JA 186, 177. Whereas petitioners proceeding under the preexisting statute had only to demonstrate custody arising from constitutional error, *Moore v. Dempsey*, 261 U.S. 86 (1923), those proceeding under the new one must prove, in addition, that the constitutional "error [is] grave enough to be called 'unreasonable.' " JA 181.

To comprehend the *extent* of this "retrenchment from former practice" (JA 177), consider a prisoner convicted on a confession that the state courts held voluntary under the established rule of *Brown v. Mississippi*, 297 U.S. 278 (1936). Before the 1996 amendment, a federal habeas court treated a petition raising an involuntariness claim as "a new suit brought . . . to enforce a civil right." *Ex parte Tom Tong*, 108 U.S. 556, 559-60 (1883). The federal habeas court adjudicated the claim entirely *de novo*, paying the state supreme court's decision no more heed than other relevant authority – *i.e.*, treating it as nothing more than "the conclusion of a court of last resort of another jurisdiction." *Brown v. Allen*, 344 U.S. 443, 458 (1953); see *Stone v. Powell*, 428 U.S. 465, 477 (1976) ("full reconsideration of . . . constitutional claims").

Such a claim was governed by the "longstanding position that the ultimate question of the admissibility of a confession . . . [is] a legal inquiry requiring plenary federal review." *Miller v. Fenton*, 474 U.S. 104, 115 (1985). Even if the state opinion correctly stated the rule of *Brown v. Mississippi* and its progeny, the federal court was obliged to grant relief if the decision applying that rule and admitting the confession was wrong. *Id.* at 112.

Teague v. Lane, 489 U.S. 288 (1989), did not alter this responsibility when it barred the creation of new legal rules on habeas. For when "the rule in question is one which of

necessity requires a case-by-case examination of the evidence, . . . a rule designed for the specific purpose of evaluating a myriad of factual contexts," the rule "can tolerate a number of specific applications without saying that those applications themselves create a new rule." *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment).

In short, then, if a prisoner's conviction rested on a confession that the state courts had held voluntary by applying the governing legal standard to the totality of circumstances, but that a federal court would find was involuntary under the same standard and circumstances, the prisoner's filing of a habeas petition triggered an unconditional right to release or retrial. This remedy was qualitatively superior, in virtually every case, to other state and federal remedies, given its "as of right" character, immunization from *res judicata* defenses, and availability without further development of the record.

Indisputably, amended § 2254(d) changes things in the cases to which it applies. The crucial questions are what and how much it changes, and to what cases it does apply. By its terms, amended § 2254(d) follows *Teague*'s lead in limiting federal habeas review to rules of law that are not new – *i.e.*, to rules that were "clearly established" at the time of direct review. Extending *Teague*, the amendatory language of § 2254(d)

- requires federal courts to treat the state decision as more than relevant authority – as the focus of review, and, barring a statutorily specified error, the law of the case;
- unqualifiedly limits federal review to legal rules *in effect* when the state court ruled – thus abandoning *Teague*'s application on habeas of law announced after the state court ruled but before certiorari was due or denied (or even later, in two exceptional situations), cf. *Teague*, 489 U.S. at 305, 307; and
- confines review to legal rules that *bound* the state courts when they decided the case – *i.e.*, rules that were clearly established by this Court, and not just a federal circuit court.

This is what § 2254(d) as amended says it does. But on the elaborate reading given it by the court below, the statute goes much further and in quite surprising directions. On that reading, a federal court's finding of a constitutional violation in admitting an involuntary confession into evidence produces habeas relief only if the state reviewing court somehow managed to misstate the one-word "voluntariness" test – only if its "opinion . . . [in]correctly states the holdings" of *Brown v. Mississippi* and its progeny. JA 198. If the state court correctly articulated the rule but incorrectly applied it to the facts so as to produce an outcome that "errs" under established standards, the federal court (in all but a few "grave" cases, JA 181) can do nothing but ineffectually point out the error. JA 179. Though it is "free to express an independent opinion on [the] legal issues in the case," it cannot attach any legal consequence to its conclusion that the decision conflicts with the Constitution; it must leave the legally erroneous decision in force. JA 176, 179.

And in deciding whether the state court's error was "unreasonable" or "grave," the court must consider that the requisite totality of circumstance analysis is "painted in shades of grey, rather than in contrasting colors." JA 182. Consequently, a state court's "fact-specific answer *cannot* be called 'unreasonable' even if it is wrong. . . . " JA 197 (emphasis added).

The reading below thus converts habeas corpus from a right to relief when a state court has erred in applying clearly established law to the facts into a summary denial of relief in that situation. It changes habeas from a remedy having every advantage over alternative remedies into one that is inferior to any remedy with the minutest possibility of success. It works precisely the " 'far reaching' " "change [in] the standard of review" and "in . . . the authority conferred by the habeas corpus statute" to which Justice O'Connor referred in *Wright v. West*, 505 U.S. at 306 (O'Connor, J., concurring in the judgment).[11]

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[11] Courts in the two circuits that follow *Lindh* have noted how severely it alters the writ. See, *e.g.*, *Gomez v. Acevedo*, 1997 WL 39864, at *6 (7th Cir. Feb. 3, 1997) ("only deferential review for reasonableness"); *Brown v. Cain*, 1997 WL 20736, at *2, *4 (5th Cir. Jan. 21, 1997) ("substantial deference"); *Abrams v. Barnett*, 100 F.3d 485, 492-93 (7th Cir. 1996) (purely procedural inquiry into whether state decision "correctly cited" Supreme Court law and "carefully relied on . . . the record"); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996) (new "standard of review . . . akin to the . . . 'clearly erroneous' standard"); *Neal v. Gramley*, 99 F.3d 841, 843 (7th Cir. 1996) ("extremely limited" review); *United States ex rel. Centanni v. Washington*, 1997 WL 22632, at *12 (N.D. Ill. Jan. 17, 1997) ("severe test"); *United States ex rel. Jones v. Gilmore*, 1996 WL 568804, at *1 (N.D. Ill. Sept. 27, 1996) ("major hurdles").

As is developed below, the court of appeals' retroactive application of these drastic consequences to Mr. Lindh's case cannot stand under *Landgraf*'s standards for determining the applicability of new law to pending cases.

B. The *Landgraf* Standard for Assessing the Applicability of New Legislation to Pending Cases

Landgraf confirms that the question whether a new law applies to pending cases is fundamentally one of statutory intent. As with all such questions, " 'where the congressional intent is clear, it governs.' " *Landgraf*, 511 U.S. at 264 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990)). Where statutory intent was unclear, however, the courts had applied a number of different rules, some of which were in " 'apparent tension' " with each other. *Landgraf*, 511 U.S. at 264.

Landgraf undertook to clarify the appropriate analysis by articulating a three-step process for determining to what cases a new statute will apply. *Id.* at 263-80; see *Lockheed Corp. v. Spink*, 116 S.Ct. 1783, 1792 (1996). Step One of the analysis is to determine "whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280; *Lockheed*, 116 S.Ct. at 1792 (Court "must determine whether Congress has plainly delineated the temporal scope of the [new] amendments"). If Congress has done so, the analysis is over; "there is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

When the statute contains no such delineation, Steps Two and Three of the analysis are necessary. In Step Two, the Court "determine[s] whether the new statute would have retroactive effect" – *i.e.*, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 280, 269-70.

If the Court determines that the new law would have "new legal consequences," then at Step Three the "traditional presumption" against statutory retroactivity applies, and the new law is held inapplicable to pending cases unless a "clear congressional intent" to ordain such retroactive application appears. *Id.* at 280. Conversely, if the Court determines that the new statute would *not* have new legal consequences constituting "genuinely 'retroactive' effect" (for example, if it involves what are sometimes loosely called "procedural" or "remedial" matters, *id.* at 276, 285 n.37), a presumption arises in favor of applying the statute to pending cases; but this presumption may be overcome by a showing of " 'manifest injustice or [that] there is statutory direction or legislative history to the contrary.' " *Id.* at 277 (quoting *Bradley v. School Bd.*, 416 U.S. 696, 711 (1974)).

In the instant case, Step One in the *Landgraf* analysis is decisive, because Congress has "plainly delineated the temporal scope of the [1996] amendments," *Lockheed*, 116 S.Ct. at 1792, and has excluded § 2254(d) from those that apply to pending cases. Moreover, the amended § 2254(d) would attach "new legal consequences" to completed events in a manner that would raise the presumption against retroactive operation if the section's application to pending cases were considered in conformity with *Landgraf*'s Step Two. But it does not ultimately matter which step or aspect of *Landgraf*'s analysis this Court elects to focus on initially; they all point to the same outcome more or less directly.

Inasmuch as the language and the structure of the habeas provisions of the 1996 Act bear upon both Step One and Step Three, it will be most efficient to discuss those two steps together. And because Steps One and Three are straightforward and will spare the Court the need to parse the new legal consequences of § 2254(d) – a subject that is complicated by

the court of appeals' reading of the amendment – we begin with the legislative text (in Part II.A) and its instruction for Steps One and Three in *Landgraf* (in Part II.B) before proceeding to Step Two (in Part III).

II. The Court of Appeals Misread the Act as Leaving to the Courts to Decide, Rather than Specifying, the Provisions that Shall Apply to Cases Pending on the Date of Enactment

A. The Structure of the 1996 Act's Habeas Provisions

The changes to habeas corpus law made by the Antiterrorism and Effective Death Penalty Act of 1996 are set forth in Title I of that Act. Title I contains two sets of revisions.

First, Title I amends four preexisting sections of Chapter 153 of the Judicial Code, provisions that apply to all habeas cases, capital and noncapital. Act §§ 101-106, *amending* 28 U.S.C. §§ 2244, 2253-2255. *Second*, Title I adds an entirely new chapter to the Judicial Code – Chapter 154 – which consists of six provisions applicable only to capital cases from states that have opted to establish their own postconviction procedures meeting certain requirements. Act § 107, *enacting* 28 U.S.C. §§ 2261-2266.

New § 2254(d) – the revision at issue in this case – is one of the revisions to *Chapter 153*.

B. Congress Clearly Intended and Plainly Expressed that the 1996 Amendments to Chapter 153 of Title 28 Are to Be Applied Prospectively Only

All of the ordinary indicia of statutory intent – the language and the structure of the 1996 law, the background against which the law was enacted, and well-established rules of statutory construction only recently called to Congress' attention – converge in this case. They all show that the revisions to Chapter 153 are not supposed to apply to cases pending on the date of the new law's enactment. Congress has "expressly prescribed the statute's proper reach." *Landgraf*,

511 U.S. at 280. At the very least, congressional intent is clear. Thus, under either Step One or Step Three, the result is the same. (See subsection 1 below.) The arguments that have been raised to the contrary, including those proffered by the court below, are unpersuasive. (See subsection 2 below.)

1. As a matter of express language and of statutory intent, none of the 1996 Act's revisions to Chapter 153 of Title 28 is applicable to Mr. Lindh's case

In its 1994 *Landgraf* decision, this Court recognized that its "precedents [had] left doubts about what default rule would apply in the absence of congressional guidance" on the question whether a new statute applies to pending cases. 511 U.S. at 261. To resolve the "Congressional doubt concerning judicial retroactivity doctrine," *id.*, *Landgraf* informed Congress that future substantive legislation would normally be presumed *not* to apply to pending cases. *Id.* at 277, 286. The Court did this both to "giv[e] legislators a predictable background rule against which to legislate" and to "assur[e] that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits," thereby "allocat[ing] to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." *Id.* at 272-23.

Just two years after *Landgraf*, the 1996 Law was enacted, with its habeas corpus revisions in Title I. Undoubtedly aware of the recent *Landgraf* decision crystallizing a "predictable background rule,"[12] Congress considered the question whether any portion of Title I would be applied to cases pending before the Act went into effect. Congress reached a different answer for each Chapter. The answers were announced in the statutory text in two places: in § 107(c) of the Act and in § 2264(b) of newly enacted Chapter 154.

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[12] *Landgraf*, 511 U.S. at 273; see *id.* at 257-58 n.10; *Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 698-99 (1979).

a. Section 107(c) of the Act.

The issue of Title I's temporal reach is most directly addressed in § 107(c) of the Act. 110 Stat. 1214, 1226. It provides that "*Chapter 154* of title 28, United States Code (as added by subsection (a) [of § 107]) *shall apply to cases pending on* or after *the date of enactment* of this Act" (emphasis added). By its express terms, § 107(c) identifies which "cases pending on the date of enactment" are subject to the habeas corpus revisions in the Act, and it specifies which of the revisions apply to those pending cases. Succinctly, the Act makes all of the Chapter 154 revisions applicable to pending capital cases in qualified opt-in jurisdictions.

The Act's express language making the Chapter 154 provisions applicable to these particular pending cases and its omission of any similar language in regard to the Chapter 153 provisions (which were next-door neighbors in the very same Title of the same Act) reveals a clear statutory intent that *only* the Chapter 154 provisions apply to pending cases. This conclusion follows naturally, by straightforward reasoning that this Court has repeatedly used in interpreting statutory texts. "The fact that Congress chose to impose some forms of [retroactivity], but not others, indicates a *deliberate congressional choice* with which the courts *should not interfere*." *Central Bank v. First Interstate Bank*, 511 U.S. 164, 184 (1994) (emphasis added). "Obviously, then, when Congress wished to provide [for retroactive application of habeas corpus reform], it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979).[13]

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[13] See *Custis v. United States*, 511 U.S. 485, 491 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1983)); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213-14 (1988).

Thus, by itself, the language of § 107(c) conveys both that Congress considered the question of Title I's proper reach and that it made a "deliberate" choice to "provide[ ] precisely the [retroactive applications] it considered appropriate." *Central Bank*, 511 U.S. at 184; *Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 15 (1981). Inasmuch as there are no "indicia of a contrary congressional intent" (*id.*) – let alone the requisite "strong" indicia (*id.*) – the plain text of the statute should be enforced just as it reads: retroactive application of the new habeas provisions in Title I is limited to Chapter 154 cases.

The conclusion that § 107(c) designates exclusively the portions of the Act's habeas provisions that apply to pending cases is reinforced still further by the fact that § 107(c) was enacted just two years after *Landgraf*. Congress was surely aware of the "predictable background rule" of *prospectivity* that *Landgraf* had taken pains to pronounce, partly because such a rule "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." 511 U.S. at 273. In this context, the enactment of a retroactivity provision in Title I of the Act that included one group of revisions (Chapter 154) but excluded another (Chapter 153) ratifies the construction derived from the plain text alone: the Chapter 153 revisions do *not* apply retroactively to "cases pending on" the date of enactment.

b. Section 2264(b).

Congress' answer to the retroactivity question did not stop with § 107(c). Had it enacted only § 107(c), then only the new *Chapter 154* provisions would have applied to pending cases from opt-in states; the revisions to *Chapter 153* were not among those made applicable to Chapter 154 cases "pending on . . . the date of enactment." § 107(c). But the 1996 Act was making significant revisions to provisions within Chapter 153, particularly § 2254(d) and § 2254(e) (affecting evidentiary hearings). Because none of Chapter 153's provisions was independently applicable to pending cases, Congress had to take an additional step, beyond specifying that Chapter 154's

provisions would apply to pending cases, to make §§ 2254(d) and (e) applicable to pending Chapter 154 cases.

And Congress did so. It enacted a provision within Chapter 154 – § 2264(b) – that specifically assimilated the new §§ 2254(d) and (e) into the proceedings for those pending cases that fall within Chapter 154's reach.[14] Had Congress intended the revisions in Chapter 153 to apply to all pending cases, there would have been no need to enact § 2264(b), because §§ 2254(d) and (e) would have been independently applicable. Section 2264(d) can be explained only if Congress intended to do precisely what § 107(c) says: to make Chapter 154 and its contents alone applicable to pending cases. Any other reading would make § 2264(b) mere surplusage. But "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metropolitan Educ. Enter.*, 117 S.Ct. 660, 664 (1997).

2. The arguments against the Act's plain meaning are meritless and would replace *Landgraf*'s analysis with a presumption that courts and not Congress should determine the retroactivity of new laws

Despite these clear indications in the Act, the court below concluded that Congress did not answer the "retroactivity question," but left the matter for the judiciary to resolve. JA 158. The court found that § 107(c) raised "at most a negative implication" as to the Act's temporal reach. *Id.* It

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[14] Section 2264(b) provides that "[f]ollowing review subject to subsections (a), (d), and (e) of § 2254, the court [in a Chapter 154 case] shall rule on the claims properly before it." Although § 2264(b) refers to § 2254(a), which was not amended by the Act, that reference is entirely logical: once Congress expressly made §§ 2254(d) and (e) applicable to pending cases within Chapter 154's scope, it added a reference to § 2254(a) to forestall a court from concluding, based on "*expressio unius est exclusio alterius*," that Congress had intentionally excluded § 2254(a). See *Walters v. Metropolitan Educ. Enter.*, 117 S.Ct. 660, 665 (1997) (" 'mere' elimination of evident ambiguity is ample – indeed, admirable – justification for the inclusion of a statutory phrase").

rendered § 2264(b) irrelevant by reading that section – through the very "negative implication" reasoning that it had just rejected with respect to § 107(c) – as designed to limit the provisions of Chapter 153 that apply in *any* Chapter 154 proceeding, including cases filed after enactment. JA 160. The court of appeals' reasoning was flawed at virtually every step. We address those flaws first. (Subsections B.2.a-B.2.c below.) Then we take up additional arguments that the state or its *amici curiae* are likely to proffer. (Subsections B.2.d-B.2.e.) What is interesting about all of these arguments is that none of them claims to find any affirmative evidence that the revisions to Chapter 153 are intended by Congress to apply to pending cases; rather, all are aimed at delivering the whole subject of retroactivity back into the keeping of the courts.

a. "Congress left the retroactivity issue to judicial resolution."

Initially, the court of appeals misapplied *Landgraf* by inferring that Congress "le[ft] the subject [of Chapter 153's retroactivity] to judicial resolution." JA 158. *Landgraf* did reach such a conclusion with respect to the 1991 Civil Rights Act, but it did so for two reasons. First, it found affirmative evidence that Congress intended the courts to decide the retroactivity issue. As *Landgraf* explained, extensive retroactivity provisions had been included in a previous version of the Civil Rights Act that was vetoed, and thereafter Congress eliminated those provisions from the version that the President agreed to sign. 511 U.S. at 255-56. Second, at the time the 1991 Act was passed, this Court's "precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance." *Id.* at 261.

Nothing remotely akin to these two considerations exists in the present case. No affirmative evidence of any sort suggests that Congress intended to fob off the habeas corpus retroactivity issue to the courts. And *Landgraf* itself resolved the preexisting "doubts about what default rule would apply." *Id.* Consequently, in sharp contrast to the backdrop of the 1991 Civil Rights Act, the rule in effect when the 1996 habeas

corpus legislation was enacted clearly informed Congress that, if it did not make its intent regarding retroactivity clear, the result would not be to invoke judicial creativity but to trigger a presumption of prospective application.[15]

Given these differences, the court of appeals' conclusion that Congress left the matter to the courts has stood *Landgraf* on its head. Under the Seventh Circuit's analysis, the rule would be that retroactivity issues will *always* be decided by the courts unless Congress explicitly provides to the contrary. This "rule" is the exact opposite of what *Landgraf* strove for: to "allocate[ ] *to Congress* responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." 511 U.S. at 273 (emphasis added). And the Court had good reasons to assign Congress this responsibility, since a determination as to whether a new enactment should apply to pending cases or past conduct involves a weighing of "the benefits of retroactivity [against] the potential for disruption or unfairness," *id.* at 268, 272-73 – basic legislative judgments of policy for which the courts are ill-suited.

b. " 'Negative implications' cannot form the basis for finding a statute to have purely prospective operation."

The court below also misanalyzed what it termed the "negative implication" argument based on § 107(c). The court

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[15] The court of appeals speculated that "[p]erhaps" Congress simply "overlooked" the question whether Chapter 153 should apply to pending cases because "the changes to Chapter 153 and the new Chapter 154 originated in different Houses of Congress at different times." JA 158. The court's speculation is wrong. While the substantive provisions of Chapter 154 did originate in a different House of Congress at a different time from those of Chapter 153, *this is not true of the retroactivity provision of § 107(c)*. That section was added in the Senate, *after* all the other Chapter 154 *and* Chapter 153 provisions (including § 2254(d)) were in the bill in their final form. Compare 141 Cong. Rec. S7567 (May 25, 1995) with S.735, tit. VII(A) (May 1, 1995) (available on LEXIS); see p. 28 *infra*.

concluded that because *Landgraf* rejected a "negative implication" argument in that case, a "negative implication" argument should fail in every case. JA 158-60. This mischaracterizes Mr. Lindh's argument – and misreads *Landgraf*.

First, Lindh's argument would stand upon more than a "negative implication" even were it limited to § 107(c) (which it is not). For § 107(c) *is* the Act's designation of which cases its habeas revisions apply to. This is no matter of "implication": § 107(c) *specifies* Chapter 154 as the single subject of application to pending cases.

Second, contrary to the court of appeals' understanding, there is nothing inherently inadequate about a "negative implication" argument in retroactivity jurisprudence (see, *e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-14 (1988)) although the specific "negative implication" argument made in *Landgraf was* inadequate. Barbara Landgraf's "negative implication" argument was premised on a provision in the 1991 Civil Rights Act that made "two comparatively minor and narrow provisions in a long and complex statute" prospective only. *Landgraf*, 511 U.S. at 258. From this, she argued that Congress meant the rest of the "long and complex statute" to apply retroactively. *Id.* This Court did not agree, because Congress would not have "chosen to resolve [the retroactivity issue] through negative inferences drawn from two provisions of quite limited effect" and because "doubts about what default rule would apply" existed at the time the 1991 Act was passed. *Id.* at 259, 260-61 & n.12.

Landgraf's careful and considered approach to the "negative implication" argument made in that case is at odds with the court of appeals' assumption that such arguments are invalid or suspect as a class. And the factors that *Landgraf* pointed to as reasons why the "negative implication" argument failed there are the opposite of the factors bearing on Lindh's case. The provisions that § 107(c) makes applicable to pending cases are not "comparatively minor and narrow provisions" of "quite limited effect." Section 107(c) makes the entirety of Chapter 154 applicable to pending cases; and Chapter 154 comprises *fully half* of the Act's habeas revisions. Indeed, the capital-specific Chapter 154 revisions in

Title I were so important to Congress that it named the entire *nine-title* Antiterrorism and *Effective Death Penalty Act* after those provisions. Nor, two years after *Landgraf*, was Congress unaware of what inferences would be drawn from its silence. *Landgraf* told Congress, before it enacted the revisions to Chapter 153, what conclusion would be drawn if it did not specify whether those revisions applied to pending cases. It is one thing to conclude, as in *Landgraf*, that a negative implication will be insufficient to warrant *retroactivity* when the negative implication is opposed by affirmative indications of contrary congressional intent and is based on minor provisions of "limited effect" that were enacted when there was doubt about the default rule the courts would apply. It is quite different when *expressio unius* reasoning is used to justify *prospective* application, is consistent with all other indicators of statutory intent, and is derived from a specification of retroactivity governing a central component of the new law, enacted after the Court had pronounced a background rule favoring prospectivity.

c. "Petitioner's 'misunderstanding' of section 2264(b)."

As previously noted, the nonretroactivity conclusion to be drawn from § 107(c) is corroborated within Title I itself by the enactment of 28 U.S.C. § 2264(b), the sole function of which is to apply certain specified provisions found in the otherwise nonretroactive Chapter 153 to pending cases covered by Chapter 154. See subsection II.B.1.b above. The court of appeals claimed that this reasoning "misunderstands" § 2264(b). JA 159.

According to the court of appeals, § 2264(b) is a statute that delineates which provisions in Chapter 153 will have *any* application in Chapter 154 proceedings, not a statute delineating which *amended* provisions will apply to *pending* Chapter 154 cases. In the court's view, the Chapter 153 provisions listed in § 2264(b) are adopted into Chapter 154, and those omitted are – by negative implication – "replace[d] [with a provision] more favorable to the states." JA 160. This construction of § 2264(b) is patently wrong.

At the outset, the irony of this rationale should not be lost on the Court. The court of appeals was willing to espouse a "negative implication" in connection with § 2264(b) but not with § 107(c); and it neither explained the inconsistency nor seemed to notice it.

Moreover, the court of appeals' interpretation of § 2264(b) – not its use of negative implication, but the implausibility of what it implied – will produce outlandish results. Rather than lead to rules that are "more favorable to the states" in Chapter 154 cases, the court's interpretation will instead *withdraw* defenses that are currently available to these states. Consider, for example, the court of appeals' assertion that, because the exhaustion doctrine of 28 U.S.C. § 2254(b) is not listed in § 2264(b), that doctrine has been "replace[d]" by § 2264(a).[16] This would mean that, in a Chapter 154 proceeding, the state could not demand that important claims be exhausted in state court, as, for example, when a prisoner discovers a claim after state direct and postconviction proceedings and can establish that the factual predicate for the claim "could not have been discovered [earlier] through the exercise of due diligence." 28 U.S.C. § 2264(a)(3). Under the court of appeals' reading, such a claim would never have to be exhausted in state court at all. Exhaustion would not be required by the general exhaustion statute – Chapter 153's § 2254(b) – because (according to the court below) that section's exhaustion requirement has been "replace[d]" by § 2264(a), JA 160; and § 2264(a) would not require the claim to be "raised and decided on the merits in the State courts" because of § 2264(a)'s own "due diligence" exception (quoted in note 16).

Indeed, under the lower court's reading, the state in this situation would lose no less than *three* important benefits

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[16] In pertinent part, § 2264(a) provides that in Chapter 154 proceedings, "the district court shall only consider a claim or claims that have been raised and decided on the merits in State courts, unless the failure to raise the claim properly is . . . based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review." 28 U.S.C. § 2264(a)(3).

embodied in Chapter 153. First, the claim could not be returned to the state courts for exhaustion of state remedies because the exhaustion statute has assertedly been "replace[d]" by § 2264(a). Second, and as a result, the state courts would never get the opportunity to make factfindings in regard to the claim that are entitled to a presumption of correctness in federal habeas proceedings. Cf. *id.* § 2254(e)(1). Third, and most queerly, the prisoner could entirely circumvent the new adjudication standard of § 2254(d) itself – § 2264(b) notwithstanding. Section 2254(d) is triggered only if the "claim" previously "was adjudicated on the merits *in State court proceedings*." *Id.* § 2254(d) (emphasis added). By eliminating the exhaustion requirement, the court of appeals' reading would allow the prisoner to take the newly discovered claim directly to federal court under § 2264(a)(3), without ever letting a state court "adjudicate [it] on the merits in State court proceedings" and, thus, without triggering § 2254(d).

There is no evidence that Congress meant to achieve any of these results. The more reasonable conclusion is that it was the court of appeals, not petitioner, that "misunderstood" § 2264(b).

d. The relevance of the retroactivity provisions elsewhere in the Antiterrorism Act.

It has been argued (though not by the court below) that the Antiterrorism Act contains both retroactivity and prospectivity provisions outside of Title I, and thus that the failure to include Chapter 153 within § 107(c) has no meaning. See *Hunter v. United States*, 101 F.3d 1565, 1569-70 (11th Cir. 1996). This argument is meritless.[17]

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[17] Although the *Hunter* court listed five sections of the Act that it thought applied changes made by the Act solely to post-enactment cases, in fact only two of the provisions fall into that category. In the other three sections, Congress clearly *did* apply the new provisions to pending cases but was selective as to *which* pending cases the provisions are to govern. *See* Act, § 211 (changes in restitution law apply to pending cases in which defendant had not been convicted as of date of enactment); § 235(h)

Any inter-title analysis of the Antiterrorism Act is an illusory endeavor because the Act's fitful process of construction did not resemble a single author's crafting of a cohesive monograph in nine chapters, but instead the transcontinental journey of a locomotive picking up (and shedding) freight cars from a variety of railroads, with cars bearing their own design, cargo and insignia, and each lacking any clues as to the provenance and content of the others. However, unlike the Act as a whole (and most of its other titles), the *habeas* title *was* crafted as a cohesive whole by members of the Senate Judiciary Committee, and their deliberate decision to make the Chapter 154 provisions, but not the Chapter 153 amendments, applicable to pending cases was made following careful consideration of the habeas title – but only the habeas title – as a whole. See 141 Cong. Rec. S7803 (June 7, 1995). There is, thus, every reason to embrace Congress' manifest intent to apply the Chapter 154, but not the Chapter 153, provisions to pending cases.

The legislative history of § 107(c) confirms this point. Section 107(c) was first added to the habeas title of the Act as part of an omnibus amendment offered on May 25, and approved by the Senate on June 7, 1995. *Id.* at S7567, S7857, S7868-71. The addition of § 107(c) (then, § 607(c)) was the only habeas-related change in the June 7 omnibus amendment; the other habeas revisions in what would become Title I were already in the bill, in their final form. Compare original S.735, tit. VII(A) (May 1, 1995) (available on LEXIS; see 141 Cong. Rec. S5841) with S.735 as revised by Amendment 1199 (141

(closed circuit television provisions apply to pending cases filed after January 1, 1995); § 903 (attorney-compensation provisions apply to pending cases in which appeal is perfected on or after enactment date). The other two sections *Hunter* cites (§§ 435 & 441) both came from an immigration bill passed by the House of Representatives, and were added to the Act by the Senate more than nine months after § 107(c) had been added. *See* pp. 28-29 *infra*. And one of these sections *had* to apply only in the future, because it took away a defense to a criminal charge. Act, § 441 (limiting use of faulty deportation order as defense to crime of illegal reentry).

Cong. Rec. S7567 (May 25, 1995)). At the time § 107(c) was added, there were only two other provisions anywhere in the Act that alluded to pending or future court cases, and *both* provisions operated just like § 107(c); they made specified new provisions in the Act *retroactive* to pending cases. §§ 206(c), 303(f). *None* of the five allegedly "prospective only" sections relied on in *Hunter* was in the bill at that time, and they did not become part of the Act until nine month later, when numerous provisions of a House immigration bill were incorporated into the bill that became the 1996 Antiterrorism Act. See 142 Cong. Rec. H2288 (March 14, 1996).

The supposedly "prospective" provisions elsewhere in the Act have no relevance to the otherwise clear and quite explicit intent of § 107(c): at the time § 107(c) was adopted (and for nine months thereafter), the Act contained no provisions limiting *any* of its new laws to future cases, and thus there is no reason to doubt that § 107(c) means exactly what it says.

e. "The critical date for retroactivity purposes is the date of future court decisions."

A final argument that might be made concerning the applicability of the Chapter 153 provisions to pending cases is that Congress did not intend for the issue of prospectivity or retroactivity to turn on when a habeas case was filed but on the time at which any cognizant court (in this case, the court of appeals) comes to make a ruling that turns upon the law affected by the particular provision in question (in this case, amended § 2254(d)). A moment's consideration reveals that this argument is doubly flawed.

First, § 107(c) demonstrates that when Congress was considering the issue of the temporal reach of Title I, it saw the critical event to be whether a "case" was "pending" on the date of enactment. Only by injecting a very different view as to the determinative retroactivity event could a court decide that the Act was actually meant to apply prospectively to future "rulings" in "cases pending" on "the date of the enactment of this

Act."[18] Second, any decision that the Chapter 153 amendments apply to future federal court decisions on pending or future habeas cases would render § 2264(b) a nullity, turning it into useless surplusage (unless one adopted the implausible interpretation of that section tendered by the court of appeals in this case).

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In sum, the court of appeals wrongly disregarded Congress' express directive and demonstrable intent that only Chapter 154 in the Act, not Chapter 153, is to be applied "to cases pending on . . . the date of enactment." Act, § 107(c).

III. The Court of Appeals Misread *Landgraf* and Two Centuries of Retroactivity Law in Concluding that it Could Apply § 2254(d) to Mr. Lindh's Case Notwithstanding the New Legal Consequences its Interpretation Attaches to Pre-Act Events

The Act's clear specification of the pending cases – not including Mr. Lindh's – to which its habeas revisions apply is dispositive of § 2254(d)'s inapplicability here. Were that not

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[18] Any such holding would unsettle *Landgraf* itself. For, by parity of reasoning with the argument here, the "determinative event" in *Landgraf* would occur when a decision was made as to compensatory damages. (After all, the statute at issue there refers to a plaintiff's "recovery" of compensatory damages, not to the tortfeasor's behavior.) Although, in *Landgraf* itself, the damages decision had already been made by the district court before this Court's ruling (indeed, before the 1991 Act), other cases raising similar claims had not yet reached a damages decision by either date. If the relevant retroactivity event in *Landgraf* was a court decision on whether to award compensatory damages, the rule it announced should have been that the 1991 Act did not apply to pending cases that had already reached a damages ruling, but *did* apply to pending cases that had not. That was not what *Landgraf* held, and it would require a major reworking of retroactivity jurisprudence to reach such a result. Moreover, any such reworking would lead to further problems. Continuing with the *Landgraf* example, if the relevant retroactivity event is a court proceeding on compensatory damages, the new law would apply on appeal of a damages decision – and thus make *Landgraf* wrong even as to Barbara Landgraf.

so, *Landgraf* would provide an alternate route to the same conclusion, because the designedly result-altering interpretation that the court below gave to § 2254(d) "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. Whereas Lindh had a matured and unconditional right to habeas relief when he filed his July 9, 1992 petition showing custody and constitutional error, the April 24, 1996 amendment of § 2254(d) as interpreted below would require him to show in addition that the error was "unreasonable" and "grave," and then would deny him relief because errors "painted in shades of grey" "*cannot* be called 'unreasonable.' " JA 181-82, 197 (emphasis added). Because the longstanding presumption of prospectivity precludes these retroactive effects absent a clear statutory directive – lacking here – *Landgraf* forbids the application of § 2254(d) as interpreted below.[19]

The court of appeals based its conclusion that § 2254(d) has no retroactive effects on two premises: (1) that "new legal consequences" are limited to those that adversely affect a party's "legitimate reliance interests in the operation of the former law," JA 157; and (2) that there is a "presumpti[on]" that "legal changes that reduce the willingness of federal courts to set aside [state] judgments . . . apply to existing judgments." JA 166. Both premises are wrong. As any tenable reading of *Landgraf*'s "new consequences" test reveals, and as is confirmed by a line of cases stretching back 200 years from *Landgraf* and its companion, *Rivers v. Roadway Express*, 511 U.S. 298 (1994), there is no more classically "retroactive effect" than the changed outcome produced by applying a

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[19] Mr. Lindh emphasizes again that the posture of the case requires him for the sake of argument to treat the court of appeals' interpretation as a given despite its fatal statutory and constitutional flaws. If the Court concludes that Step Two of *Landgraf*'s retroactivity analysis is crucial to the issue of § 2254(d)'s applicability and that the analysis turns on the consequences that a properly interpreted § 2254(d) would attach to pending cases, it should then expand the issues under consideration to include Question 2 in Lindh's certiorari petition and permit supplementary briefing.

statute that alters the shape of a cause of action to a law suit by which that cause of action already had "matured and become unconditional" before the statute was enacted.

A. "New Legal Consequences" Are Not Limited to Those that Adversely Affect a Party's Reliance Interests and Extend to Normative, Outcome-Determinative Changes in Matured Causes of Action

1. The court of appeals' flawed reliance analysis

Permeating the court of appeals' analysis is its assertion that the only "new legal consequences" that "matter[ ]" for retroactivity purposes are those that adversely affect a litigant's "legitimate reliance interests in the operation of the former law."[20] The court's transformation of the "new legal consequences" inquiry into a search for "reliance interests" is entirely unsupported – indeed, rejected – in the case law.

To begin with, the "new consequences" test has for two centuries been the Court's measure of retroactive effects.[21] Yet, the Court has *never* qualified the test with anything like a "reliance" requirement. Rather, as the Court commented in a footnote in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), only "one line of cases" – comprised of three decisions, the latest decided 58 years ago – treats reliance as a "significant" factor. *Id.* at 18 n.16.[22] Moreover, *Usery* and two

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[20] JA 157; see JA 163, 165-66, 170 (retroactivity turns on "steps [Lindh] took" in "reliance on . . . prior . . . law"; whether he can prove " 'reliance on past [law] . . . as a basis for his actions' "; whether, "when deciding . . . to commit a crime . . . he relied on the availability of the version of § 2254 that was on the books"; and whether there was a "reliance interest nearly that strong").

[21] See *Landgraf*, 511 U.S. at 269-70 & n.23 (citing numerous cases); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

[22] All three cases addressed a question different from the one here – whether a new statute that *expressly* applied to the dispute was sufficiently retroactive to violate due process. See *Carpenter v. Wabash Ry.* 309 U.S. 23

of the cases it cites are part of a much longer and more distinguished line of decisions – all of them taken by *Landgraf* as authoritative – in which courts have found retroactive effects despite the clear *absence* of reliance interests affected by the new statute. Because the decisions are so numerous – some are collected in Appendix II to this brief – it must suffice here to discuss two of them, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), and *Rivers*.

In *Bowen*, the Government sought to invoke a 1984 regulation, which it had adopted to replace an identical 1981 regulation that was struck down on procedural grounds in 1983, in order to recoup some of the Medicare reimbursements paid the respondent hospitals for the 1981-1983 period. The Government's argument was "no reliance": Because the 1981 regulation had notified the hospitals of the rule that the 1984 regulation reinstated, the hospitals could not complain that preexisting law had misled them in any way when they performed the 1981-1983 services in question. *Bowen*, 488 U.S. at 215. The Court's holding was "new legal consequences": Because the higher rate was legally in force when the hospitals' right to reimbursement matured – between the 1983 demise of the initial regulation and its resurrection in 1984 – applying the new regulation would have the effect of decreasing the reimbursement to which they previously were entitled by law. *Id.* at 207. And the Court's precise answer to the Government's "no reliance" argument was, "irrelevant" – the Court declined to determine whether the hospitals had or had not relied. *Id.* at 215. In concurrence, moreover, Justice Scalia expressly *assumed* that "the invalidated 1981 [regulation] furnished respondents with 'ample notice' of the standard that . . . applied" and concluded that "[i]t makes no difference." *Id.* at

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(1940); *Welch v. Henry*, 305 U.S. 134 (1938); *Louisville & N. Ry. v. Mottley*, 219 U.S. 467 (1911). Two of the cases – as did *Usery* itself – held the statute "retroactive" (but not unconstitutionally so) under the "new legal consequences" test *despite the acknowledged absence of any frustrated reliance interests*. See *Usery*, 428 U.S. at 17; *Welch* at 146-48; *Louisville & N. Ry.*, at 484; Appendix II *infra*. The third case found reliance, but upheld the statute anyway. *Carpenter* at 24-25, 29.

225 (Scalia, J., concurring). Although the absence of frustrated reliance interests might have rendered the 1984 regulation's application less "unfair," "[t]he issue is not whether . . . rule-making is fair" but whether it is "retroactive" – which Justice Scalia concluded the 1984 regulation was, in violation of the Administrative Procedure Act. *Id.*

Six years later, in *Rivers*, the Court declined to apply § 101 of the 1991 Civil Rights Act to a pending case in order to provide a remedy for private discrimination under § 1981 of the sort the Court had held unavailable in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *Rivers*, 511 U.S. at 304. Again, the plaintiffs' argument was "no reliance": § 101 could not be said to have blindsided the defendant, whose discriminatory acts occurred *before Patterson*, when the "prevailing understanding of the reach of § 1981" and all the immediately governing precedents forbade the discrimination. *Id.* at 307, 309 n.9, 312-13. And again, the Court found the absence of reliance unimportant and decided the case under the new legal consequences test. Although acknowledging "that respondent ha[d] *no persuasive claim to unfair surprise*, because, at the time the allegedly discriminatory discharge occurred, the [governing] precedent held that § 1981 could support [the plaintiffs'] claim," the Court held § 101's application retroactive because it "alter[ed] the normative scope" of § 1981 liability as *Patterson* had authoritatively defined it prior to § 101's adoption. *Id.* at 303, 309 n.9 (emphasis added).

Landgraf itself could hardly be clearer about the non-dispositive role of reliance interests in retroactivity analysis. It specifies a wide range of ways in which a "new legal consequence" may be found, and by no means limits itself to situations involving a "reliance interest." Among the kinds of statutory provisions that have "retroactive effects" are those that (1) "affect[ ] substantive rights," *Landgraf*, 511 U.S. at 278, or (2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280, or (3) "sweep away settled expectations suddenly and without individualized consideration," *id.* at 266, or (4)

" 'change[ ] the legal consequences of acts completed before [the new law's] effective date,' " *id.* at 269 n.23, or (5) "give[ ] 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed,' " *id.*, or (6) "impos[e] new burdens on persons after the fact," *id.* at 270, or (7) may be "retributive," *id.* at 282, or (8) "creat[e] a new cause of action," *id.* at 283, or (9) " 'change . . . the principles of liability,' " *id.* at 285 n.37; or (10) " 'change . . . the amount or the elements of damage in [a] wrongful-death statute,' " *id.* at 284 n.36; or (11) " 'increase, decrease or repeal' " "limits on the amount of damages available," *id.*; or (12) "*restrict*[ ] subcontractors' rights to recover damages from prime contractors," *id.* at 285, or (13) "alter the normative scope" of a preexisting right of action, *Rivers*, 511 U.S. at 303.

The wide range of legal changes encompassed by a "new consequences" approach to retroactive effects responds directly to the many "sound considerations of general policy and practice" that the antiretroactivity presumption serves. *Landgraf*, 511 U.S. at 270, 286. In discussing those policies, *Landgraf* repeatedly makes clear that it is not just reliance interests, but "settled expectations" of all kinds, that "should not be lightly disrupted."[23] *Id.* at 266. Thus, as *Landgraf* notes, the legislature is not an ordinary private "promisor" that needs be "estopped" from breaking unilateral promises only when a "promisee" detrimentally relies. Rather, there are numerous *public* harms that motivate the presumption of prospectivity, and, similarly, *ex post facto* doctrine, the rule against arbitrarily withdrawing entitlements generated by positive law, and other limits on government promise-breaking – as to *none* of

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[23] *Landgraf*, 511 U.S. at 270 ("retroactivity is a matter on which . . . considerations of fair notice, reasonable reliance, *and* settled expectations offer sound guidance"); *id.* at 282 n.35 ("concerns of unfair surprise *and* upsetting expectations"); *id.* at 265 n.18 (" 'deprive citizens of legitimate expectations *and* upset settled transactions' "); *id.* at 266 ("interests in fair notice *and* repose") (all emphasis added).

which which has detrimental reliance ever been required:[24] There is, for example, (1) "[t]he Legislature's unmatched powers . . . to sweep away settled expectations suddenly and without individualized consideration," *id.*; (2) its "responsivity to political pressures . . . and [the] risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals," *id.*; (3) its capacity to use retroactive legislation to interfere with "the judicial Power" over pending cases;[25] (4) citizens' inability to insulate themselves from the government, as they can from private promise-breakers whom they distrust – and the dangers that attend distrust of the state; (5) the inefficiencies and dislocations that arise when individuals not only are denied the chance to have behaved differently in the past to avoid the effects of a new law but, more importantly, are impelled to behave differently in the future – to " 'speculate on public measures' " or take other actions to insure against unpredictable legislative changes;[26] and, above all, (6) the danger of sacrificing "stability," "repose," and "a rule of law that gives people confidence

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[24] The *Ex Post Facto* Clause forbids states after the fact to increase the punishment to which offenders may be subjected, though the change (*e.g.*, in the method of computing "gain time" in prison) is too modest, technical and contingent to alter potential offenders' behavior or have a predictable effect on any given offender. See, *e.g.*, *Lynce v. Mathis*, 65 U.S.L.W. 4131 (U.S. Feb. 18, 1997); *Weaver v. Graham*, 450 U.S. 24, 35-36 & nn.18-20 (1981); Laurence H. Tribe, American Constitutional Law 629 (1988) ("reliance . . . cannot account . . . for the [*ex post facto* cases]."). The Court's procedural due process cases provide another close analogy to antiretroactivity doctrine. And in that context as well, it is the state's withdrawal of a legally created expectation *per se*, and not the frustration of reliance interests, that triggers constitutional protection. See examples in Appendix III *infra*. The same is true of doctrines forbidding state officials to give individuals an "implied promise" that their silence will not be used against them, then penalize them for keeping silent. See *id.*

[25] See *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1452, 1461-62, 1469 (1995); Norman J. Singer, Sutherland's Statutes and Statutory Construction § 41.08 (5th ed. 1992).

[26] *Landgraf*, 511 U.S. at 267 n.20. When legislatively created expectations are secure, most litigants will choose the single best option

about the legal consequences of their actions." *Id.* at 266, 271.[27] As the Court stated nearly 200 years ago, in refusing to read a new law so as to impair expectations (in a case in which there "admit[tedly]" was no reasonable reliance, see Appendix II below):

> [T]hat confidence which it is the interest of every government to cherish in the minds of her citizens, a confidence which experience leaves no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation . . . suggested by her own laws . . . [u]nless . . . the words [of a later statute affecting that right] are too imperious to admit of a different construction. . . .

United States v. Heth, 7 U.S. (3 Cranch) 399, 408 (1806).

Landgraf, indeed, explicitly subordinated reliance in its precise holding. It concluded that awarding compensatory damages under § 102 of the 1991 Civil Rights Act would impermissibly "impose . . . a 'new disability' in respect to past events," notwithstanding that respondent's reliance claims

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among the potential means of redress – in Lindh's case, habeas, rather than state collateral or certiorari, review. Under the regime inaugurated by the court of appeals, however, in which *in*security reigns, litigants are compelled to pursue *all* available means of redress in hopes that one will remain available when a court finally rules. The pertinent question thus is not what Aaron Lindh would have done in the past had he seen the 1996 Act coming, but rather what millions of litigants will do in the future when they realize that they may be freely subjected to legislation that they can't see coming.

[27] See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 Const. Commentary 329, 355 (1993) ("Injuries that are caused by decisions solely traceable to . . . [the legislature] represent a betrayal of trust in a way that is not the case when the triggering decision is made by an individual acting entirely in his or her own interest."); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 465 (1982) ("[E]ven if planning is not involved, something important may be at stake, for some aspects of the rule of law involve human dignity. If the 'rules of the game' are altered retroactively, and without good warrant, then the legal system is saying in effect that those disadvantaged . . . do not count for much.").

lacked "force" because the new provision "only reache[d] discriminatory conduct already prohibited"; were "further muted" because most "such discrimination was . . . already subject to monetary liability in the form of back pay"; and were additionally "attenuated" by the "intentional" and "morally reprehensible" nature of the "discrimination, which has been unlawful for more than a generation." *Landgraf*, 511 U.S. at 282-83 & n.35. Because the best that could be said was that reliance "concerns would not be entirely absent," *id.* at 282 n.35, the Court rested its holding, instead, on the conclusion, irrespective of reliance, that "creating a new cause of action" for compensatory damages "attach[ed] an important new legal burden" in respect to past events: "[C]ompensatory damages are quintessentially backward-looking"; they "make victims whole . . . by a mechanism that affects the liabilities of defendants"; they "confer[ ] a new right to monetary relief" by "increasing the amount of damages available under a pre-established cause of action." *Id.* at 282-83. Although " '[r]etroactive modification' of damages remedies may 'normally harbo[r] much less potential for mischief than retroactive changes in the principles of liability,' . . . that potential is nevertheless still significant." *Id.* at 285 n.37 (citation omitted). See *Rivers*, 511 U.S. at 303 (similar).

In addition to defying precedent, the court of appeals' translation of "new legal consequences" into a "legitimate reliance interest" is a conceptual and practical disaster. It sends the courts down a long, chaotic and uncharted road that can only lead to one of two unhappy destinations. Either every pending habeas case (indeed, every litigant's case, whenever the legislature amends *any* statute without clearly indicating whether it applies to pending cases) would have to be examined on an individual basis (as the court of appeals purported to do here, *see* JA 171) to see what the party and his or her lawyers relied on in making significant litigation decisions – an inquiry in which the courts would presumably have to conduct an evidentiary hearing as to the motives and bases of

those decisions.[28] Or, alternatively, the courts could attempt to decide the issue of reliance on the basis of some generalized speculation as to what an entire class of litigants in petitioner's position would rely on (as the court of appeals also purported to do, *see* JA 170) – in which event, the courts would have to define the relevant class in each case: is it, for example, all habeas petitioners? all noncapital habeas petitioners? all habeas petitioners with Sixth Amendment claims? with claims involving "mixed questions of fact and law"? all who passed up alternative remedies of one or another sort before filing their habeas petition? all from a particular state? Either way, "the judiciary" would be burdened "with the micromanagement of an endless array of" factual and "speculative" possibilities. *California Dep't of Corrections v. Morales*, 115 S.Ct. 1597, 1603 (1995). Only by broadly defining the concept of "new legal consequences," as the Court's decisions culminating in *Landgraf* have always done, can this prolonged and ill-defined retroactivity sidetrack be avoided.

2. The retroactive effect of legislatively altered outcomes of matured causes of action

The holdings of *Landgraf* and *Rivers* do more than reject reliance as the alpha and omega of retroactivity analysis. They also place those cases squarely in line with the classics of American retroactivity law – the very decisions in which the "new legal consequences" test was developed and on which

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[28] States' Attorneys advancing the detrimental reliance test are now demanding that petitioners support reliance claims by affidavit or evidentiary proof. See Brief for Respondent-Appellee State of Massachusetts at 22, *Martin v. Bissonette*, No. 96-1856 (1st Cir. filed Jan. 24, 1997). And well they might. Each of the crucial prerequisites of the promissory estoppel doctrine to which the court below appealed – actual and substantial reliance, foreseeability of reliance, detriment, and mitigation – is a question of fact rarely susceptible to summary judgment. See, *e.g.*, *Thermocor, Inc. v. United States*, 35 Fed. Cl. 480, 490 (1996); *Vastoler v. American Can Co.*, 700 F.2d 916, 920 (3d Cir. 1983); 1 Corbin on Contracts § 8.9 (E. Mills, ed. 1996).

Landgraf expressly premised its holding. See *Landgraf*, 511 U.S. at 270, 283-85 (citing *Winfree v. Northern Pac. Ry.*, 227 U.S. 296 (1913); *United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306 (1908); *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.); *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. 1811) (Kent, C.J.)). Each of these cases – and many others besides – involved a new statute's potential interference with a preexisting judicial or administrative "right of action" or defense.[29] In each, the court explicitly determined that the rights involved were such that (in the older terminology) they had "vested"[30] or (in modern terms) they "had matured or become unconditional"[31] upon the formal initiation of the proceeding – in the elementary sense that the preexisting statute under which the action was filed recognized nothing that could thereafter occur (short of the movant's death) that would alter the parties' rights and liabilities.[32] In

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[29] See, *e.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 4 (1926) ("defeat claims on which suits duly brought were then pending"); *Winfree*, 227 U.S. at 302; *Murray v. Gibson*, 56 U.S. (15 How.) 420, 423 (1853); *Society*, 22 F. Cas. at 759, 768; *Dash*, 7 Johns. at 497, 502 ("take away or clog a remedy which a party has by . . . law"; "defeat a suit already commenced, upon a right already vested"); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 243 (1927) ("where a remedy is extinguished or substantially impaired and no alternative remedy [is] provided").

[30] *E.g.*, *Struthers*, 209 U.S. at 312; *Heth*, 7 U.S. (3 Cranch) at 414; *Society*, 22 F. Cas. at 767-69.

[31] *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985); *Bradley v. School Bd.*, 416 U.S. 696, 720 (1974) (citing cases).

[32] After inquiry "to ascertain the probable legislative intent," the courts in these cases determined that the proceeding's formal initiation constituted the "determinative event by which retroactivity . . . [was] to be calculated." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 & n.3 (1990) (Scalia, J., concurring). See, *e.g.*, *Bennett*, 470 U.S. at 637, 639-40 ("pre-existing right to recovery," which matured upon government's issuance of "final determination letter" demanding refund); *Greene v. United States*, 376 U.S. at 153, 160 ("petitioner's rights matured

each case, the court also determined that the precise intent of the *new* statute was substantially to alter the normative scope of the cause of action or defense – by, for example, changing the elements of the action or defense, the standard of review, the burden of proof, or the amount of available relief.[33] And in

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and were asserted" upon filing of administrative complaint, *i.e.*, "after the claim had arisen and had been formally asserted"); *United States v. Magnolia Petr. Co.*, 276 U.S. 160, 162 (1928) (administrative "claims fixed [upon filing for refund] in accordance with earlier [statutory] provisions"); *Struthers*, 209 U.S. at 315 ("respective rights of the parties settled, and the cause of action already in existence"); *Society*, 22 F. Cas. at 759, 761, 767 (accepting claim that "right of recovery was . . . perfect and unconditional" or "absolute and unconditional" when suit was brought and rejecting claim that right could not "vest" until plaintiff actually "shall have recovered"); *Dash*, 7 Johns. at 479-80, 483-84, 494 (rejecting claim that right of action could not vest until relief was granted because "plaintiff, at the commencement of his suit, had a vested right of recovery against [defendant]"); *Mathews v. Kidder, Peabody & Co.*, 947 F.Supp. 180, 185 (W.D. Pa. 1996) (applying new law would "deprive [plaintiffs] of their RICO causes of action which were viable at the time this lawsuit was filed"); *District 65 v. Prudential Sec.*, 925 F.Supp. 1551, 1570 (N.D. Ga. 1996) (right of action " 'vested' " "[u]pon filing of the complaint").

The requirement that the right to relief have matured and become *unconditional* upon the filing of the suit distinguishes the Court's cases applying statutory changes affecting the right to injunctions, licenses, and other similar relief. In those cases, the preexisting statute itself provided that changes in conditions up to the very moment the court or agency ruled could alter the parties' rights. See *e.g.*, *Ziffrin, Inc. v. United States*, 318 U.S. 73, 75 (1943) (where, *inter alia*, change in ownership of applicant company at any time before license was granted or denied would affect right to license, Commission properly applied statute adopted "between the filing of the application and the entry of the order denying it").

[33] See, *e.g.*, *Landgraf*, 511 U.S. at 277 (changes in " 'the main cause of action' "); *Bennett*, 470 U.S. at 638 ("changes in substantive requirements for [relief]"); *Greene*, 376 U.S. at 156, 163 (regulation "significantly and substantially altered" "determinations" needed for petitioner to prevail); *Struthers*, 209 U.S. at 313 (substantively "affect the cause of action"); *Lyons v. Ohio Adult Parole Auth.*, 1997 WL 20401, at *11 (6th Cir. Jan. 22, 1997) (applying new statute's "higher burden" for

each case – irrespective of reliance (which was absent in most of the cases, see Appendix II below, and undiscussed in most of the rest) – the court held that the new statute's alteration of the pending cause of action would constitute a new legal consequence attached to the action's filing, hence a retroactive effect that would not be permitted absent clear legislative command.

Greene v. United States, 376 U.S. 149 (1964), is illustrative. Greene accepted employment and then was terminated by a military contractor when the Navy arbitrarily revoked his security clearance in 1953. Although at the time he apparently had no right to monetary restitution, the Defense Department gave him that right by regulation in 1955, and he applied for it in 1959. Because Greene's "rights" thus were "matured and . . . asserted under the 1955 directive" as of 1959, the Court ruled that the Department could not insist that Greene satisfy new "substantive requirements" and adduce proof supporting "additional factual determinations" that a 1960 regulation had imposed as prerequisites for restitution. *Id.* at 156-57, 160, 163.

Mr. Lindh's case fits squarely within the rule and holdings of these cases. His 1992 habeas petition, filed after exhausting his state remedies in 1991, established the two statutory elements of habeas relief – his "custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2241(c)(3).

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certifying habeas appeal to already filed appeal "would raise obvious retroactivity concerns"); *United States v. $814,254.76*, 51 F.3d 207, 212 (9th Cir. 1995) ("lower standard of proof[] directly implicates the concerns that animate . . . *Landgraf*"); *United States ex rel. Dabbs v. Page*, 1996 WL 467237, at *3 (N.D. Ill. 1996) ("narrows the standard of review"); *United States v. Eleven Vehicles*, 898 F.Supp. 1143, 1153 (E.D. Pa. 1995) (application of "different standard of proof . . . that permits [party to succeed] upon a lesser showing of culpability . . . cannot be countenanced under *Landgraf*"); *U.S. Steel Mining Co. v. Riddle*, 627 So.2d 455, 457-58 (Ala. Civ. App. 1993) (changes "standard of review"; alters " 'presumptions (and their effects) and burden of proof [which] are "substantive" ' " (quoting *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959))); other cases collected in Appendix II *infra*.

Under the statute as it then stood, he thereby caused his right to habeas relief to "mature[ ] and become unconditional." The terms of the governing statute could not be more directive: "[A] district court *shall* entertain an application for a writ of habeas corpus . . . on the ground that [the applicant] is in custody in violation of the Constitution. . . . " *Id.* § 2254(a) (emphasis added). "A court . . . entertaining an application for a writ of habeas corpus *shall* forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted. . . . " *Id.* § 2243 (emphasis added). "The court *shall* summarily hear and determine the facts and dispose of the matter as law and justice require." *Id.* (emphasis added). Under the law as it existed upon the filing of Mr. Lindh's petition in 1992, nothing short of Mr. Lindh's death – not even his unconditional release from prison, see *Carafas v. LaVallee*, 391 U.S. 234 (1968) – could have divested him of his right to relief from the constitutional violation in his case.

On the court of appeals' interpretation of the new statute, moreover, § 2254(d)'s application to Lindh's case interfered with his already matured cause of action in the most "substantive" of ways. On that interpretation, § 2254(d)'s precise design was to "adjust the circumstances under which the remedy of the writ of habeas corpus is deployed" (JA 186); to supplement the custody and constitutional error elements with a new one – that the "error [be] grave enough to be called unreasonable" (JA 181); in short, to transform Mr. Lindh's constitutional claim from one on which relief may well have been granted (JA 197) to one on which relief "cannot be" granted (*id.*). In retroactivity terms, the statute's precise design was to attach drastic new legal consequences to Mr. Lindh's "matured . . . and asserted" cause of action – to " 'change[ ] . . . the principles of liability' " and the "elements of" relief, *Landgraf*, 511 U.S. at 284-85 nn.37, 26; to impose new "substantive requirements" and require "additional factual determinations," *Greene*, 376 U.S. at 163; and, overall, to "alter the normative scope of" the writ, *Rivers*, 511 U.S. at 303.

The court of appeals did not deny that its reading of § 2254(d) constituted a change which "affect[ed] [petitioner's] substantive rights," *Landgraf*, 511 U.S. at 278, and "change[d] the legal consequences" of completed state court proceedings and a habeas petition already filed, *id.* at 269 n.23. Nor could the court reasonably have done so. If "changing . . . limits on the amount of damages available in wrongful death actions" is a "new legal consequence" (*id.* at 284 n.36) – and if "restricting subcontractors' rights to recover damages from prime contractors" is, too (*id.* at 285) – then changing the elements of a petitioner's already asserted claim, and limiting his preexisting right to relief for a constitutional violation, must also be "new legal consequences" under *Landgraf*. As the Second Circuit held with respect to the amended § 2254(d), if "the new statute would require a different outcome, application of the new statute . . . would be retroactive." *Boria v. Keane*, 90 F.3d 36, 37 (2d Cir. 1996). Any other conclusion flouts *Landgraf*.

3. Lindh's reliance

Although frustrated reliance interests do not exhaust "new legal consequences," they may be relevant; and they are present here. After the Wisconsin Supreme Court's adverse decision in 1991, Lindh had a choice of how to proceed. He could seek habeas relief in federal court, where the law at the time gave him a clear right to a *de novo* adjudication of his constitutional claim, or he could ask this Court to exercise its discretion to hear the case on certiorari. In reliance on the law as it then stood, Lindh gave up his chance for review by this Court and opted for his right to *de novo* review via federal habeas.

That decision was informed by the Court's longstanding practice of denying certiorari in "mixed question" cases expressly because federal habeas review was available.[34] As

[34] See, *e.g.*, *Schiro v. Indiana*, 493 U.S. 910, 911, 914 (1989) (opinion of Stevens, J., respecting denial of certiorari); *Davis v. Balkcom*, 369 U.S. 811, 811-12 (1962) (memorandum of Warren, C.J., respecting denial of certiorari); *Irvin v. Indiana*, 353 U.S. 948 (1957) (mem.); *Sheppard v. Ohio*, 352 U.S. 910, 910-11 (1956) (memorandum of Frankfurter, J., respecting denial of certiorari); *Burke v. Georgia*, 338 U.S. 941 (1950) (mem.).

Justice O'Connor has explained, the Court is disposed to deny certiorari following state direct review if the petitioner "can proceed to federal court and petition for a writ of habeas corpus," and if that avenue is "sufficient to afford full review of petitioner's substantial constitutional claim." *Wills v. Texas*, 114 S.Ct. 1867 (1994) (O'Connor, J., concurring in denial of certiorari). The crucial premise of this practice is the availability of "full [habeas] review" – which gives state prisoners federal review commensurate with the Court's review of mixed questions, and lets the Court limit its review to the narrow subset of cases in which lower federal courts have left constitutional error intact.[35] Justice Kennedy gave the same explanation for denying certiorari in *Spencer v. Georgia*, 500 U.S. 960, on June 3, 1991, during Mr. Lindh's April-July 1991 certiorari period:

> A majority of the Court has voted to deny certiorari and, after initial reservations, I now concur in that judgment. This case appears to present important questions of federal law, and if I thought our decision in *Teague v. Lane* . . . would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari.

Id. (Kennedy, J., concurring in denial of certiorari).

Under the habeas statute in place when Mr. Lindh declined to seek certiorari, his decision meant that he forwent a right to *request* this Court's plenary review but preserved the right to *receive* that review from the lower federal courts and *then* (if need be) seek the Court's review. As a "new legal consequence" of the court of appeals' interpretation and application of the 1996 amendment of § 2254(d), however, Lindh's decision to forgo certiorari turns out to have abdicated his only opportunity for plenary federal review and

[35] See, *e.g.*, *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *Miller v. Fenton*, 474 U.S. 104 (1985).

redress of his unconstitutional conviction. It thus is impossible to fathom the court of appeals' conclusion that "Lindh gave up nothing of value by deciding not to seek certiorari."[36]

B. No Presumption Exists that "Legal Changes that Reduce the Willingness of Federal Courts to Set Aside Judgments . . . Apply to Existing Judgments"

The second permeating theme in the decision below is the assertion that "legal changes that reduce the willingness of federal courts to set aside [state] judgments presumptively apply to existing judgments." JA 166.[37] This bald effort to

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[36] JA 171. The court's analysis of Lindh's decision to forgo state collateral review is equally flawed. As of 1991, such review was available to address any claim for relief that was not raised on direct review. See, *e.g.*, *Bergenthal v. State*, 242 N.W.2d 199, 200-01 (Wis. 1976). And Lindh had at least one such claim, based on documents (unsuccessfully proffered below, see note 3 *supra*) revealing that, on appeal, the State knowingly misrepresented facts that the Wisconsin Supreme Court then relied on in denying Lindh relief. In finding no detrimental reliance, the court below concluded that "Lindh does not qualify" for state collateral review under the strict rule of *State v. Escalona-Naranjo*, 517 N.W.2d 157 (Wis. 1994), "and, if he does, the state courts remain open to him." JA 171. What the court failed to note is that the *1994* decision in *Escalona-Naranjo* expressly *overruled* the decisions in effect in 1991 that permitted collateral review of claims not raised on direct review. *See Escalona-Naranjo* at 162 & n.11 (overruling, *e.g.*, *Bergenthal*, *supra*); Ellen Henak, *The Changing Rules Governing Relief After Direct Appeal*, Wis. Defender (Jan. 1997), at 1-2 ("For almost twenty years, trial courts in Wisconsin were obligated to decide [postconviction] motions on the merits regardless of whether the claim could have been raised on direct appeal. . . . In 1994, . . . *State v. Escalona-Naranjo* . . . abruptly changed the law . . . [and] prohibited [prisoners] from raising a claim . . . that could have been raised on direct appeal"). Lindh does not *now* "qualify" for state collateral review, and the state courts are not *now* "open to him," but he did qualify, and they were open, when he opted for what was then a superior federal habeas remedy.

[37] See, *e.g.*, JA 168 ("amended § 2254(d) is designed to curtail collateral review and augment the finality of judgments, which strongly implies application to existing judgments"); JA 164 ("prisoners have [no] legitimate expectations about the scope of collateral review"); JA 168 ("To leave the [state court] judgment in force – and to leave all of the rules governing primary conduct intact – is not 'retroactive' . . . , and the amended § 2254(d) is therefore presumptively applicable.").

transform the longstanding "presumption against retroactive legislation" (*Landgraf*, 511 U.S. at 265) into a presumption favoring it is no more availing than the effort to limit the "new legal consequences" that trigger the presumption to reliance interests. For the Court's "decisions simply do not support the proposition that [it] ha[s] espoused a 'presumption' in favor of retroactive application of [habeas-curtailing] statutes." *Rivers*, 511 U.S. at 310.

The court of appeals cited three kinds of decisions to support its alleged presumption. The first was *Felker v. Turpin*, 116 S.Ct. 2333 (1996), in which the Court relied on a section of the 1996 Act – barring the Court from granting certiorari to review a court of appeals' refusal to permit the filing of a successive habeas petition – in a case in which a successive petition was filed *after* April 24, 1996. *Id.* at 2336-37. Because Felker filed his petition after the Act became law, no retroactivity issue was presented or decided; still less was any "presumption" of retroactivity articulated.

The second kind of decision to which the court of appeals resorted as supporting a supposed presumption in favor of the retroactive application of habeas-curtailing legislation involved cases that it said applied previous habeas amendments to pending cases "without so much as remarking on the date of enactment."[38] In three of the cases, there was a plain reason the Court saw no retroactivity issue: the Court was applying new statutes that (as it pointed out in each case) simply codified existing judicial precedent.[39] In the fourth case – *Carafas v.*

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[38] JA 166-67, citing *Smith v. Yeager*, 393 U.S. 122, 124-25 (1968) (*per curiam*); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Gusik v. Schilder*, 340 U.S. 128, 131-33 & n.4 (1950); *Darr v. Burford*, 339 U.S. 200 (1950).

[39] *Darr*, 339 U.S. at 210-11 (" 'This new section is declaratory of existing law' "; it "gave legislative recognition to [Court's] rule for the exhaustion of remedies"; it "embod[ied] in the new statute the rulings

LaVallee, 391 U.S. 234 (1968) – the Court adopted the habeas petitioner's expansive view of the "custody" requirement based on language added to the habeas statute in *1867*, *id.* at 239 (quoting 28 U.S.C. § 2243), pausing only briefly to note some words in a 1966 amendment that "seem" to support the point. *Id.* Just how a passing aside to a new statute – in support of an *expansive* view of the writ arrived at on the basis of a *100-year-old* statute on the way to *granting* the petitioner the relief he sought – supports a presumption in favor of retroactive application of changes "that reduce the willingness of the federal courts to set aside state judgments," JA 166, is not explained.

The third kind of precedent cited for the supposed presumption are cases "holding that changes in the law affecting judicial ability to supply prospective relief govern pending cases." JA 167. These cases are irrelevant. In all of them the preexisting statute provided that conditions in existence at the time the court or agency *ruled* would determine the right to relief, and the new statute became law *before* any ruling was made – *i.e.*, before any rights "had matured or become unconditional." See note 32 above. The statutes thus attached no "new legal consequences to events *completed before* [their] enactment" *Landgraf*, 511 U.S. at 270 (emphasis added), but, instead, *antedated* the decisive events.

By contrast, habeas corpus is "quintessentially backward looking."[40] *Id.* at 282. The rights of the parties are determined

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drawn from the [the Court's] precedents"); *Gusik*, 340 U.S. at 131 (exhaustion "rule which Congress recently wrote into the Judicial Code" is "the holding of the Court in a long line of cases"); *Smith*, 393 U.S. at 124-25 (citing 1966 amendment to § 2244(d) together with *Sanders v. United States*, 373 U.S. 1 (1963), and a 1924 case in support of an "abuse of the writ" test taken nearly verbatim from *Sanders*' own, pre-amendment test, *Sanders*, 373 U.S. at 17-18); see *McCleskey v. Zant*, 499 U.S. 467, 487 (1991) (1966 amendment to § 2244(b) " 'incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders*.' ").

[40] See *Pitchess v. Davis*, 421 U.S. 482, 489-90 (1975) (per curiam). This Court has frequently noted the corrective nature of habeas corpus

entirely by events occurring (1) *before the action was filed*, when the alleged violation took place at trial or when a state court rejected the claim on appeal; or (2) at the *precise moment* it is filed, when the question of the petitioner's "custody" is determined. *Carafas v. LaVallee*, 391 U.S. at 238 (if "petitioner's [habeas] application was filed . . . when he was in state custody, . . . jurisdiction attache[s] . . . [and] is not defeated by the release of the petitioner prior to completion of the proceedings"). See pp. 42-43 above.

Carafas's reason for making the filing of a habeas petition decisive in assessing "custody" provides an additional, pressing reason for a presumption *against* the retroactivity of habeas-curtailing statutes, and for making the petition's filing the "determinative event by which retroactivity . . . is to be calculated." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 & n.3 (1990) (Scalia, J., concurring). For as is graphically illustrated in this case by the *35 months* of deadweight delay in the district court (over Lindh's repeated objection), see pp. 3-4 above, any presumption *of* retroactivity, or any "determinative event" subsequent to the petition's filing, would

> simply aggravate[ ] the hardships that may result from "intolerable delay[s] in affording justice." The petitioner in this case was sentenced in 1960. He has been attempting to litigate his constitutional claim ever since. His path has been long . . . because of . . . delays in our court processes. . . . He should not be thwarted now and required to bear the

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relief. See, *e.g.*, *Wainwright v. Goode*, 464 U.S. 78, 83 (1983) ("correct wrongs of a constitutional dimension"); *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982) ("correct violations of . . . constitutional rights"); *Hawk v. Olson*, 326 U.S. 271, 276 (1945) ("redress the violation of the federal constitutional right"); *Ex parte Watkins*, 32 U.S. (7 Pet.) 567, 573 (1833) ("revises and corrects the proceedings in a cause already instituted"); see also *Carey v. Brown*, 447 U.S. 455, 458 (1980) (sharply distinguishing between "attempt to attack collaterally [an] earlier state-court conviction[ ]" and "request [for] . . . prospective relief"); *Wooley v. Maynard*, 430 U.S. 705, 711 (1977) (similar).

> consequences of . . . unlawful conviction simply because the path has been so long. . . .

Carafas, 391 U.S. at 239-40 (citation omitted).

The effect of the proceedings and ruling below was likewise to lash Mr. Lindh to the tracks until the 1996 Act could overtake him and efface his previously unconditional right to relief. For centuries, the presumption against retroactivity has protected litigants against just this sort of "manifest injustice." *Kaiser*, 494 U.S. at 837. The court of appeals' trivialization of the concept of "new legal consequences," and the "presumption" it invented out of whole cloth, obliterate that protection. Moreover, the court's express transformation of the preexisting rights to due process and to habeas corpus to enforce it into mere "rights without remedies" (JA 185) and its application of that radical interpretation to deny Lindh's five-year-old petition are about as severe a set of new legal consequences attached to a completed event as may be imagined.

CONCLUSION

The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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APPENDIX I

28 U.S.C. §§ 2241-2266, with Additions (in italics) and Deletions (redlined) Made by the Antiterrorism and Effective Death Penalty Act of 1996; and § 107(c) of that Act

CHAPTER 153 – HABEAS CORPUS

Sec.
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§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and

any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus ~~and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry~~ *except as provided in section 2255.*

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

~~(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for~~

~~a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.~~

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of

them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

§ 2253. *Appeal*

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> *(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court; or*
>
> *(B) the final order in a proceeding under section 2255.*

(2) A certificate of appealability under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

~~**§ 2253. Appeal**~~

~~In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.~~

~~There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.~~

~~An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.~~

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An applicant for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

~~(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.~~

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the

right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The application shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

~~(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit~~

~~(1) that the merits of the factual dispute were not resolved in the State court hearing;~~

~~(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;~~

~~(3) that the material facts were not adequately developed at the State court hearing;~~

~~(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;~~

~~(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;~~

~~(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or~~

~~(7) that the applicant was otherwise denied due process of law in the State court proceeding;~~

~~(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.~~

~~And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.~~

(f)~~(e)~~ If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reasons is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g)~~(f)~~ A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall

not be a ground for relief in a proceeding shall not be a ground for relief in a proceeding arising under section 2254.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

~~A motion for such relief may be made at any time.~~

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attacks, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

~~The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.~~

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment making a motion created by governmental action in violation of the Constitution or laws of the Untied States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

CHAPTER 154 – SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

Sec.

2261. *Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute, procedures for appointment.*
2262. *Mandatory stay of execution; duration; limits on stays of execution; successive petitions.*
2263. *Filing of habeas corpus application; time requirements; tolling rules.*

2264. *Scope of Federal review; district court adjudications.*
2265. *Application to State unitary review procedure.*
2266. *Limitation periods for determining applications and motions.*

§2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record –

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and

accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence or counsel in such proceedings.

§2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction

review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if –

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

§2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court

affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled –

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if –

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

§2264. Section of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is –

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

§2265. Application to State unitary review procedure

(a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under death of sentence to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for

that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to an "order under section 2261(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trail proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

§2266. Limitation periods for determining applications and motions.

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not

later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the

government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to –

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to –

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.".

Antiterrorism and Effective Death Penalty Act, § 107(c)

(c) EFFECTIVE DATE – Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

APPENDIX II

ILLUSTRATIVE DECISIONS IN WHICH RETROACTIVE EFFECTS WERE FOUND IN THE ABSENCE OF FRUSTRATED RELIANCE INTERESTS[1]

A. Decisions Cited as Authoritative by *Landgraf*

Many of the cases cited as authoritative by *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994), or by cases *Landgraf* cites, found "retroactive effects" under a "new legal consequences" test although no frustrated reliance interests were present. Without claiming that this list is exhaustive even of the cases *Landgraf* cites, much less of American retroactivity law, we list some illustrative decisions and briefly discuss their facts.

1. **Bennett v. New Jersey*, 470 U.S. 632, 637-41, 644-45 (1985) (permitting Government to recoup funds from school district on ground that district misallocated funds among particular schools; Court applies regulation in effect at time recoupment action was filed (under which district's allocation among schools was improper) because that was when Government's claim " 'had matured or become unconditional' "; Court declines to apply new statute and regulation in effect at time suit was decided (under which allocation was proper), even though Government

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[1] Cases marked with an "*" refuse to apply new statutes or administrative regulations to pending actions because doing so would attach new legal consequences to events completed before the law's adoption. Cases marked with a "+" consider whether a statute or regulation that expressly applies to pending cases has retroactive effect and, if so, whether that effect violates the Constitution or an administrative agency's organic statute.

could show no detrimental reliance on prior regulation, both because Congress thereafter had declared district's allocation to be consistent with (not detrimental to) public interest,[2] and because Government owed district same amount of money under both regulations, the only question being whether money was properly allocated among district's schools).

2. +*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (cited in *Landgraf*, 511 U.S. at 261-65; discussed at pp. 33-34 *supra*).

3. **Dash v. Van Kleeck*, 7 Johns. 477, 482-84, 502, 511 (N.Y. 1811) (Kent, C.J.) (cited in *Landgraf*, 511 U.S. at 265 n.17) (refusing to apply 1810 law making escapee's recapture a complete defense to creditor's suit against sheriff for unlawfully letting debtor escape; no reliance interests because common "law . . . at the time" sheriff took custody and at time escape occurred gave sheriff same complete defense; retroactive effect found because creditor brought suit in 1809, after recent case had rejected "recapture" defense, and thus 1810 law "would . . . defeat a suit already commenced, upon a right [that had] already vested" under the law settled by the recent decision).

4. **Dempsey v. State*, 451 A.2d 273 (R.I. 1982); *Kleibrink v. Missouri-Kansas-Texas Ry.*, 581 P.2d 372, 378 (Kan. 1978) (both cited in *Landgraf*, 511 U.S. at 284 n.36, for rule that " '*decrease* . . . of the statutory maximum recoverable in wrongful death actions' " may not be applied to cases arising before new statute was adopted; no detrimental reliance because no possible claim that decedents would have tried harder to

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[2] See also, *e.g.*, *Miller v. United States*, 294 U.S. 435, 437-39 (1935); *Magnolia Petroleum*, *infra*; *White v. United States*, 191 U.S. 545 (1903) (all cited in *Landgraf*, 511 U.S. at 271 n.25).

avoid being killed had they known that amounts recoverable would be lower at time of judgment than at time of accident). Accord: *Zucker v. Voght*, 200 F.Supp. 340 (D. Conn. 1961); *Thomas v. Cumberland Operating Co.*, 569 P.2d 974 (Okla. 1977); *Lavieri v. Ulysses*, 180 A.2d 632 (Conn. 1962); *Gustafson v. Bertschinger*, 108 N.W.2d 273 (Wis. 1961).

5. **Greene v. United States*, 376 U.S. 149 (1964) (cited in *Landgraf*, 511 U.S. at 272 n.26; discussed at p. 42 *supra*).

6. +*Louisville & N. Ry. v. Mottley*, 219 U.S. 467, 472, 484-86 (1911) (discussed at pp. 32-33 n.22 *supra*) (Court finds new act's ban on discriminatory railway pricing to be "retroactive[]" when applied to rescind lifetime pass given plaintiff after accident on one of defendant's trains, though Court declines to consider claimed detrimental reliance because it is of "secondary" sort caused by nearly all legislation).

7. **Rivers v. Roadway Express*, 511 U.S. 298 (1994) (discussed at p. 34 *supra*).

8. **Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767, 769 (No. 13,156) (C.C.D.N.H. 1814) (Story, J.) (cited in *Landgraf*, 511 U.S. at 268-69, 283) (upon discovering defendants on its land, plaintiff sued to eject, at time when law required no compensation for improvements made by interlopers; because filing of suit caused plaintiff's right of ejectment without paying compensation to be "vested[,] . . . absolute and unconditional," court reversed lower court's application of statute enacted after filing of suit that required compensation for improvements; aside from not filing suit (an option that does not distinguish *Society* plaintiff from Lindh), plaintiff could have done nothing differently had new statute been in effect when it discovered interlopers and sued).

9. **United States v. Heth*, 7 U.S. (3 Cranch) 399, 407-08, 413, 414 (1806) (cited in *Landgraf*, 511 U.S. at 270) (Court "admit[s] the correctness" of Government's claim that, due to prior course of dealing, customs collectors had no basis to assume that statutory proportion of duties due them at time duties actually were paid would be same as at earlier time when they completed relevant paperwork; Court nonetheless forbids Government to apply new statutory compensation rate, in effect when duties were paid, to duties for which collectors had completed paperwork when different statute with higher compensation rate was in effect; even absent reasonable reliance, doing so would "affect or interfere with . . . antecedent rights [and] services" and "divest vested rights").

10. **United States v. Magnolia Petr. Co.*, 276 U.S. 160, 160-63 (1928) (cited in *Landgraf*, 511 U.S. at 271 n.25) (interest on overpayment of taxes for years 1916 and 1917 must be calculated from six months after claim for refund was filed in 1923 (as provided for by 1921 statute in effect when request for refund was filed) rather than from date of overpayment (as provided for by statute adopted in 1924), though Government had no notice of overpayment until 1923 and thus could have done nothing to limit amount of interest owed for 1916-1923 period, even had it known, when request for refund was filed, that it was liable for interest from date of overpayment).

11. **United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306 (1908) (cited in *Landgraf*, 511 U.S. at 284-85) (Court finds "retroactive" effect and refuses to apply new statute giving Government preference over other creditors of general contractor because statute was enacted after plaintiff subcontractor had performed and formally

demanded payment and, thus, after plaintiff's right to recover was "settled, and the cause of action already [was] in existence"; only possible reliance (not asserted in case) was of "secondary" sort that is irrelevant for retroactivity purposes (see *Landgraf*, 511 U.S. at 269 n.24), namely, possible diminution in value of subcontracting arrangements in wake of statutory changes made for other reasons).

12. *+Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) (cited in *Landgraf*, 511 U.S. at 266, 267 n.21, 272) (Black Lung Act held to require "retrospective imposition of liability" – *i.e.*, to "impose a new duty or liability based on past acts" – despite absence of any "contention that [defendants] would have taken steps to reduce or eliminate the incidence of [the disease] had the law imposed liability upon them" at time of their pre-Act behavior).

13. *+Welch v. Henry*, 305 U.S. 134, 146 (1938) (discussed at pp. 32-33 n.22 *supra*) (Court finds that statute enacted "in 1935 [that] imposed a tax on [dividend] income received in 1933" was "retroactive" and "retroactively applied" to petitioner shareholder, though Court expressly rejects petitioner's reliance argument: "We cannot assume that stockholders would refuse to receive corporate dividends even if they knew their receipt would later be subjected to a new tax.").

14. **Winfree v. Northern Pac. R. Co.*, 227 U.S. 296, 301-02 (1913) (cited in *Landgraf*, 511 U.S. at 284) (Court refuses to subject defendant to new federal wrongful death act, though defendant's pre-act conduct was subject to state wrongful death cause of action and railroad's defenses to federal cause of action were same as its defenses to state cause of action, because new law substantively altered defendant's liability

by "giv[ing] the right of action" to different plaintiff).

B. Illustrative Post-*Landgraf* Decisions

15. +*Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1510, 1447, 1461-62, 1469 (1995) (Court invalidates new statute expressly permitting particular class of judgments to be reopened; statute found to be "retroactive" under *Landgraf* despite parties' awareness before new statute was enacted that affected judgments could be reopened under several preexisting, unchallenged provisions).

16. **Bator v. Hawai'i*, 910 F.Supp. 479, 485-86 (D. Haw. 1995) (court refuses to let plaintiff amend complaint to add "new [state statutory] cause of action" for damages for sexual harassment although conduct alleged in amended complaint was basis for damages under federal statutes in existence at time of, and relied on in, original complaint and also had previously been basis for administrative award of monetary relief).

17. **Brown v. Cain*, 1997 WL 20736, at *3 (5th Cir. Jan. 21, 1997) (in state-prisoner habeas appeal filed and certified under preexisting standard permitting appeal of *all* claims upon finding of *one* nonfrivolous claim, court refuses to apply new statute requiring *each* claim to be certified under new standard; though petitioner could have done nothing to strengthen claims made in district court had he known that new standards would apply, court declines to frustrate his " 'settled expectation' . . . that he had successfully passed all . . . hurdles to [appellate] consideration of [all] his claims"). Accord: *Nickel v. Hannigan*, 97 F.3d 403, 407 n.4 (10th Cir. 1996).

18. **Burkett v. Love*, 89 F.3d 135, 138 & n.2 (3d Cir. 1996) (refusing to apply new statutory controls on successive habeas petitions to already pending successive claim although claim had only recently become discoverable and petitioner could not have included it in initial petition had he known that new restrictions on successive actions would apply). Accord: *Williams v. Calderon*, 83 F.3d 281, 285 (9th Cir. 1996); *Warner v. United States*, 926 F.Supp. 1387, 1390 n.4 (E.D. Ark. 1996).

19. **Martin v. United States*, 96 F.3d 853, 855 (7th Cir. 1996) (in federal-prisoner § 2255 appeal filed when no certification to appeal was required, court refuses to apply new statutory requirement of pre-appeal certification; though prisoner could have done nothing to strengthen claims made in district court had he known that certification would be required, denying appeal for failure to qualify for certification "would attach a new legal consequence to a completed act [the filing of the appeal] and is therefore . . . [impermissibly] retroactive[]" absent clear statutory intent). Accord: *Lyons v. Ohio Adult Parole Auth.*, 1997 WL 20401, at *11 (6th Cir. Jan. 22, 1997); *Thye v. United States*, 96 F.3d 635, 637 (2d Cir. 1996); *United States v. Lopez*, 100 F.3d 113, 117 (10th Cir. 1996).

20. **Mathews v. Kidder, Peabody & Co.*, 947 F.Supp. 180, 181, 185 (W.D. Pa. 1996) (court refuses to apply Private Securities Litigation Reform Act of 1995 to deprive court of jurisdiction and "deprive [plaintiffs] of their [pending civil RICO] causes of actions" for fraudulent sales of limited partnerships; no claim that plaintiffs – "unsophisticated 'Mom and Pop' investors" – would have avoided being defrauded

had they known that civil RICO remedy would be withdrawn, leaving them to state fraud remedies). Accord: *Klein v. Boyd*, 1996 WL 675554, at *29-*30 (E.D. Pa. Nov. 19, 1996); *District 65 v. Prudential Sec.*, 925 F.Supp. 1551, 1568-70 (N.D. Ga. 1996).

APPENDIX III

ILLUSTRATIVE DECISIONS IN WHICH DUE PROCESS VIOLATIONS WERE FOUND ON THE BASIS OF STATE DEPRIVATION OF EXPECTED BENEFITS OR BROKEN PROMISES IN THE ABSENCE OF FRUSTRATED RELIANCE INTERESTS

A. Procedural Due Process: Deprivations of Entitlements Created by State Positive Law

The antiretroactivity and procedural due process doctrines are analogous. Both constrain the government's "power to sweep away settled expectations . . . without individualized consideration." *Landgraf*, 511 U.S. at 266. Both are triggered by the State's withdrawal of "affirmative enforceable right[s]." *Weaver v. Graham*, 450 U.S. 24, 29-30 & n.13 (1981); see *Vitek v. Jones*, 445 U.S. 480, 490-91 (1980). And both presume the State's power to withhold the benefit in question, addressing only the conditions under which the State may withdraw a benefit after having adopted a statute or regulation creating a "reasonable expectation" of the benefit. *United States v. Heth*, 7 U.S. (3 Cranch) 399, 407-08 (1806); *Vitek* at 490; see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 432-33 (1982) (analogizing right to hearing prior to administrative frustration of legitimate expectations, and right to fair legislative process – including assumedly the presumption of prospectivity – prior to legislative frustration of expectations). The illustrative "no reliance" cases collected below reveal that procedural due process protection is triggered by the state's withdrawal of enforceable expectations, not by detrimental reliance.

1. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (violation found because state employment commission lost jurisdiction over petitioner's timely filed claim by failing to hold conference of parties within 120 days as required by statute; petitioner had no alternative remedy, and there was nothing he could have done differently had he known that delay beyond his control would extinguish claim).

2. *Morrissey v. Brewer*, 408 U.S. 471 (1972) (violation found based on denial of prompt parole revocation hearing following parolees' arrest; parolees benefited by right to hearing – ones who had not committed any offense or parole violation – could not have behaved even *more* innocently had they known they could be arrested and held indefinitely).

3. *Vitek v. Jones*, 445 U.S. 480 (1980) (violation found following prisoner's transfer to mental facility without hearing into mental defect; petitioner could not have altered his mental condition had he known he could be transferred at will).

4. *Wolff v. McDonnell*, 418 U.S. 539 (1974) (violation found absent showing that unavailability of assured good time credits would have caused prisoner to misbehave).

B. Breaking of Implied Promise that Silence Would Not Be Used Against Witness or Suspect

5. *Raley v. Ohio*, 360 U.S. 423, 439 (1959) (due process violation to punish immunized witnesses for contempt for refusing to testify after commission chairman told them they had right to remain silent; decision not affected by witnesses' "expressed defiance" and suggestion that they "might have behaved the same way regardless of what the Commission told them").

6. *Wainwright v. Greenfield*, 474 U.S. 284, 290, 292 (1986) (due process violation to give suspect "implied promise" that "his silence will not be used against him and thereafter to breach that promise by using his silence . . . to overcome [a] plea of insanity"; no claim that petitioner would have behaved less "sanely" when arrested had he not received *Miranda* warnings).

Supreme Court, U.S.
FILED
MAR 20 1997
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No. 96-6298

In The
Supreme Court of the United States
October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (the Act) became law on April 24, 1996. The Act amended 28 U.S.C. § 2254(d) to deprive a federal habeas court of authority to grant relief with respect to any claim that was adjudicated on the merits in state proceedings unless the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The question presented is:

Does this amendment, which precludes granting habeas relief to a person in custody under the judgment and sentence of a state court except under narrowly prescribed circumstances, apply to pending cases?

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No. 96-6298

In The

Supreme Court of the United States

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The State[1] offers the following information for the purpose of clarification.

Pursuant to Wisconsin law, Lindh had a bifurcated trial. At the guilt phase, the jury found him guilty beyond a reasonable doubt of two counts of first-degree murder and one count of attempted murder. J.A. 88. Lindh raised no issues regarding the guilt phase in his federal habeas petition.

[1]For consistency, we refer to petitioner as "Lindh" and to the respondent as "the State."

At the insanity phase, which is a dispositional phase under Wisconsin law, Lindh had the burden of proving to the jury by the greater weight of the credible evidence that as a result of mental disease he lacked substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the law. J.A. 88-89. He failed to carry his burden of proof. *Id.*

The sole issue on habeas was whether the trial court denied Lindh's confrontation rights when it refused to allow him to question the state's expert at the insanity phase, Dr. Roberts, about allegations that Roberts had engaged in sexual misconduct with female patients. J.A. 10-11. The defense wanted to ensure that the jury would not view Roberts as though he were as "'pure as the driven snow.'" J.A. 12.

At the pretrial hearing on the issue, defense counsel stated that University Hospitals had suspended Roberts' privileges, but offered no proof of that fact. J.A. 11, 96-97.

The Dane County prosecutor's office retained Roberts to examine Lindh on the afternoon of the shootings, January 15, 1988, and Roberts' critical initial interview with Lindh occurred later that same night. J.A. 89-93. Roberts interviewed Lindh again in June and August and submitted his report in August 1988. J.A. 94-95. Roberts testified at the trial in September that Lindh did not suffer from a mental disease at the time of the offense and that Lindh knew his conduct was wrong and could conform his conduct to the law. J.A. 100. Lindh never questioned Roberts about whether his opinion changed at any time between his first contact with Lindh in January 1988, his report in August, and his trial testimony in September.

Lindh did establish, however, that at the time Roberts became involved in the case and interviewed Lindh on January 15, 1988, Roberts had no knowledge of any allegations of misconduct that were going to be lodged

against him. J.A. 39. On March 8, 1988, Roberts first learned from a hospital attorney that the hospital was investigating allegations of sexual misconduct with patients. J.A. 39-41. Prior to that date, Roberts was not aware, even informally or indirectly, that such allegations might be coming down against him. J.A. 41. At that point, Roberts was aware there was a crime against such conduct but did not know the potential penalty. J.A. 40. Although he had not thought about it at the time, Roberts indicated he would presume any prosecution would be in the same county, so it would be in the Dane County District Attorney's Office. J.A. 42, 93.

Roberts learned in May 1988 that the Medical Examining Board was investigating allegations against him of sexual misconduct by three female patients. J.A. 41-42, 94. On July 8, Roberts first learned from his own attorney that the matter had been referred to the Dane County prosecutor's office and at that time he also learned that a special prosecutor was appointed. J.A. 42-44, 95. Roberts did not know until the day of the pretrial hearing that the Dane County prosecutor had even met with hospital officials. J.A. 42.

Neither Roberts nor his attorney was ever contacted by any representative of the Dane County District Attorney's Office or the police regarding the sexual misconduct allegations. J.A. 94-95. The Dane County District Attorney's Office never made any formal or informal decision regarding whether a criminal investigation or charges against Roberts were warranted. No one from the Dane County District Attorney's Office had any contact with the special prosecutor or discussed it with the special prosecutor after the special prosecutor appointment. There was no evidence that as of the time of trial any criminal investigation was conducted at all. J.A. 95.

Roberts testified at the pretrial hearing that the sexual misconduct allegations did not have any effect whatsoever

on his involvement in the Lindh case. J.A. 44. Lindh's counsel conceded that there was no allegation of bad faith or wrongdoing on the part of the prosecution. J.A. 96.

The sexual misconduct allegations involved therapist-patient relationships Roberts had between May 1982 and April 1986 with patient 1; between September 1981 and February 1983 with patient 2; and between June 1983 and February 1988 with patient 3. J.A. 22-29. Wisconsin's crime of sexual exploitation by a therapist, sec. 940.22, Wis. Stats., was enacted in 1984, effective May 18, 1984. It was originally a misdemeanor. It became a five-year felony by a change of statute effective April 30, 1986.

The Wisconsin Supreme Court upheld the trial court's refusal to allow Lindh to question Roberts about the sexual misconduct allegations. The Wisconsin Supreme Court held the circumstances in this case presented no reasonable basis for the jury to believe Roberts had a motive to curry favor or hope for leniency by virtue of his testimony in the Lindh case. J.A. 105-15. Moreover, evidence that Roberts may have engaged in professional misconduct and was subject to discipline did not tend to impeach his truthfulness and ability as an expert witness on insanity. J.A. 114-22.

SUMMARY OF ARGUMENT

This Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), establishes the proper analysis for determining whether a federal statute applies to a case that was pending when the statute became law. The United States Court of Appeals for the Seventh Circuit (Seventh Circuit or court of appeals) correctly applied that analysis in determining that 2254(d) applies to pending cases.

Under *Landgraf*, if Congress has expressly prescribed the statute's temporal reach in the text of the statute, the

courts will honor that express command. *Landgraf*, 511 U.S. at 280.

The Act expressly states that a new habeas chapter, Chapter 154 regarding capital opt-in provisions, shall apply to cases pending on or after the effective date of the Act. The Act also specifically mandates that certain non-habeas provisions are prospective or partially prospective. But it is silent regarding the temporal reach of 2254(d) as it applies to non-capital cases and capital, non-opt-in cases. Because the statute is silent, this Court must apply the principles articulated in *Landgraf* to determine whether 2254(d) applies to pending cases. This Court cannot substitute negative inferences, statutory maxims, and generalized principles of legislative intent for an express command.

Under *Landgraf*, the Court must determine whether application of the statute to pending cases would have a retroactive effect.

A statute has a retroactive effect within the meaning of *Landgraf* only if it attaches new legal consequences to events completed before its enactment. This requires examination of the "nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270. A statute has a retroactive effect if it impairs rights a party possessed when he acted, increases liability for a party's past conduct, or imposes new duties with respect to completed transactions. *Landgraf*, 511 U.S. at 280.

The *Landgraf* rules governing the temporal reach of new statutes protect legitimate interests in settled expectations, finality, and repose. This statute limits the circumstances in which a federal court has authority to grant habeas relief. Habeas is a mechanism for unsettling settled expectations and disrupting finality and repose.

Any limitation on habeas relief, therefore, protects legitimate interests in settled expectations, finality, and repose.

Examination of the nature and extent of the change in the law requires an examination of the function of habeas. It is not the function of habeas to vindicate constitutional rights; the state courts are both capable and willing to do so. Habeas is a safeguard for the rare case where the state court refuses to uphold the Constitution or fails to reasonably apply controlling constitutional principles. The nature and function of the law demonstrate that 2254(d) should apply to pending cases because it governs the authority of the federal court to grant relief.

Section 2254(d) extends, but is not critically different from, the principles developed by this Court in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality), and its progeny.[2] The federal court exercises independent interpretive power to determine whether a state court adjudication of a federal constitutional claim is contrary to controlling precedent. But where the issue is the application of that law to the facts, federal habeas relief may be granted only if the state court decision is unreasonable. Section 2254(d) does not require the federal court to leave undisturbed a reasonable, but "wrong" application of law to facts. It requires the federal court to leave undisturbed a reasonable state court application of law with which the federal court disagrees. The federal court will no longer be allowed to substitute its judgment for that of the state court. Section 2254(d) limits the authority of the federal court to grant habeas relief.

Section 2254(d) does not attach new legal consequences to completed events because it involves prospective relief and a change in procedure.

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[2]Adopted by majority in *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

Landgraf also teaches that jurisdictional statutes do not attach new legal consequences to completed events and therefore do not have a retroactive effect. Section 2254(d) is a jurisdictional statute because it limits the exercise of federal court jurisdiction.

Turning to Lindh's specific arguments, 2254(d) does not divest a habeas petitioner of a vested, mature, or unconditional right or alter the normative scope of a cause of action. Lindh claims the statute deprives him of a right to relief that attached on the date he filed his habeas petition. Lindh's attempt to analogize to contract, property, tort, and discrimination cases fails. Neither the crime, the state court proceedings, nor the filing of the petition constitutes a relevant past event which is substantially connected to the operation of the new law. The "right" Lindh claims is nothing more than an expectation or hope of a particular outcome in his case. Such an expectation or hope is not protected from a change in the law.

The court of appeals did not erroneously substitute an actual reliance test or a wrongful presumption of retroactivity for habeas-curtailing statutes for the principles announced in *Landgraf*. Rather, as *Landgraf* instructs, the court of appeals considered the nature and extent of the change in the law to determine whether the new law attaches new legal consequences to completed events. So viewed, 2254(d) would not have a retroactive effect if applied to pending cases.

Alternatively, we ask, "what is the relevant activity that the rule regulates?" *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 291 (1994) (Scalia, J., concurring; joined by Kennedy, J., and Thomas, J.). Section 2254(d) regulates the federal court activity of granting or denying habeas relief. When a federal court exercises authority to grant or deny relief, it can only exercise the authority it possesses at the time it acts. A federal court exercising such

authority after 2254(d) became law, as the court of appeals did here, is constrained to exert only the limited authority given to it by 2254(d).

ARGUMENT

SECTION 2254(d) APPLIES TO ALL CASES PENDING ON OR AFTER THE DATE OF ITS ENACTMENT.

I. Brief Summary Of The *Landgraf* Framework Used To Determine Whether A New Statute Applies To Pending Cases.

This Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), sets forth the proper analysis for determining whether a federal statute applies to a case that was pending when the statute was enacted. Under *Landgraf*, if Congress has expressly prescribed the statute's proper reach, the court will honor Congress's express command. *Landgraf*, 511 U.S. 264, 280.[3] However, if the statute contains no express command, the court must determine whether application of the new statute would have a retroactive effect. *Id.* at 280. A statute has a retroactive effect only if it attaches new legal consequences to events completed before its enactment. *Id.* at 269-70. If the statute would have a retroactive effect, it will not be applied to a pending case absent clear congressional intent favoring that result. *Id.* But if the statute would not operate retroactively, then the court should apply the statute to a pending case. *Landgraf*, 511 U.S. at 277.

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[3]The court, of course, will not apply a statute to pre-enactment conduct if such application would be unconstitutional. Here, Lindh does not allege, and could not demonstrate, that application of this statute to pending cases would violate any constitutional provision.

Under *Landgraf*, there is no presumption against applying a statute to pending cases or to pre-enactment conduct. There is only a presumption against such application if the statute involved falls within that "class of new statutes that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277.

Here, Congress has not expressly prescribed the statute's proper temporal reach. Accordingly, an analysis of whether the statute would have a genuinely retroactive effect is necessary. That analysis demonstrates that application of 2254(d) to pending cases would not have a retroactive effect.

II. The Act Does Not Expressly State Whether 2254(d) Applies to Pending Cases.

When a case involves a federal statute enacted while a suit is pending, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If Congress has provided such an express command, that command will govern. *Id.*

In this case, Congress did not expressly prescribe the proper temporal reach of 2254(d). Congress made no express command that the statute would apply to all cases pending on or after April 24, 1996. It made no express command that the statute would apply only to petitions filed after April 24, 1996. It made no express command that the statute would apply only to cases in which the crime occurred or the state court adjudicated the petitioner's claim after April 24, 1996. Rather, Congress was wholly silent regarding the temporal reach of 2254(d). Since Congress chose not to expressly command the proper temporal reach of a statute, this Court must determine the statute's temporal reach by applying the principles established in *Landgraf*, 511 U.S. at 263, 280.

Although Congress was silent as to the temporal reach of provisions in Chapter 153, including 2254(d), Congress did expressly provide that the new Chapter 154 of Title 28 (special habeas corpus proceedings in capital cases, dubbed the "opt-in provisions") "shall apply to cases pending on or after the date of enactment of this Act." Antiterrorism and Death Penalty Act, sec. 107(c) of Ch. 154. Lindh's classic negative inference argument (because Congress specifically provided that Chapter 154 applies to pending cases, Congress meant that no other habeas provisions of the Act apply to pending cases and thus all provisions except those encompassed in Chapter 154 are prospective only) must be rejected.

Congress directly designated the new Chapter 154 habeas provisions of the Act applicable to pending cases. Congress remained silent regarding the immediate applicability of all the other habeas provisions amended by the Act. The first prong of the *Landgraf* analysis does not look to a broad question of legislative intent; it requires an express command. *See Hunter v. United States*, 101 F.3d 1565, 1569 (CA11 1996). If there is no express command, this Court must apply the principles of *Landgraf*. Lindh deliberately commingles step one of *Landgraf*, which requires an express command, with step three, which considers legislative intent. But under a proper application of *Landgraf*, this Court will reach step three only if Lindh first fails to prove the statute contains an express command (step one) and only if he succeeds in proving that application of the statute to pending cases would have a genuinely retroactive effect (step two).

This Court must reject Lindh's theory because it requires the Court to construe silence as an express command; it requires the Court to find an express command from a negative inference; and it requires the Court to substitute general canons of statutory interpretation for an express command of Congress. *Landgraf* rejected the kind of arguments upon which Lindh

relies. *Landgraf*, 511 U.S. at 257-63; *Lindh v. Murphy*, J.A. 158-60.

Congress's express command that the new habeas opt-in chapter is applicable to pending cases is, quite simply, not an express command that all the other habeas provisions in the entire Act are prospective only.

The court of appeals quite rightly rejected Lindh's convoluted theory that sec. 2264(b) constitutes an express command that 2254(d) and 2254(e) are prospective as to all cases except capital opt-in cases. The court of appeals explained that 2264(b) does not specify the temporal reach of provisions; it specifies which 2254 provisions apply to capital opt-in cases (Chapter 154 cases). For example, the 2254 provisions regarding exhaustion and procedural default are not applicable because Chapter 154 contains its own provisions on those matters. *Lindh v. Murphy*, J.A. 159-61.

Even if this Court could substitute a negative inference for an express command, there is no support for the inference Lindh asks the Court to draw. There is a simple and logical explanation for why Congress specifically provided that the Chapter 154 provisions would apply to pending cases. Unlike the general habeas provisions in the rest of the Act, the death-penalty-related provisions in Chapter 154 are applicable only if a state establishes a mechanism for the appointment of counsel in postconviction cases that meets the strict standards set forth in that chapter. This relationship could suggest that Chapter 154 only applies to future state proceedings:

> Viewed in this light, it is not surprising that Congress expressly declared its intention that chapter 154 *could* apply to a capital habeas case currently pending in federal court where the state already had standards in place that satisfied the chapter's new requirements. The specific language

> stating the scope of the chapter's application was necessary to negate the inference, created by the statutory language, that the new chapter only affected future state cases.

Leavitt v. Arave, 927 F. Supp. 394, 398 (D. Idaho 1996) (emphasis in original).[4]

On the other hand, there is no sensible explanation for why Congress would want 2254(d), which admittedly reduces the likelihood that a habeas petitioner will be granted relief, to apply to some capital cases, but not to all capital cases and not to any non-capital cases.

Congress's silence on the temporal applicability of the habeas provisions outside of Chapter 154 is inherently ambiguous. We don't know why the Act does not contain an express command that 2254(d) applies to all pending cases. Perhaps Congress could not reach agreement, so the matter was left to the courts to determine.[5] Perhaps Congress overlooked this detail. Or perhaps Congress thought it so clear that 2254(d) would be interpreted to apply to all pending cases that express provision was not necessary. But such speculation is neither fruitful, nor necessary. The point is, Congress did not provide an

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[4]Other courts have held that the habeas provisions in Chapter 153 apply to pending cases. For a representative sampling only, *see Hunter v. United States*, 101 F.3d 1565 (CA11 1996); *Drinkard v. Johnson*, 97 F.3d 751 (CA5 1996), *cert. denied*, 65 U.S.L.W. 3598 (U.S. Mar. 3, 1997) (No. 96-7359); *Moore v. Johnson*, 101 F.3d 1069 (CA5 1996); *Williams v. Stegall*, 945 F. Supp. 145 (E.D. Mich. 1996).

[5]Lindh's amicus suggests as much, contending that sec. 2254(d) "represents a compromise between different camps of habeas reformers--a compromise necessary to win passage of a general reform bill in 1996" (brief of amicus, National Association of Criminal Defense Lawyers, at 8).

express command, and thus this Court must apply the principles established in *Landgraf* to determine the proper temporal reach of the statute.

In *Landgraf*, this Court invited Congress to take responsibility for deciding the temporal reach of statutes. After *Landgraf*, Congress was on notice that if it reached agreement about the temporal reach of a statute and if it wanted that agreement to govern, it must include an express command regarding the reach of the statute in the text of the statute. If it failed to do so--inadvertently, deliberately, due to lack of agreement, or for any other reason--the courts would apply the *Landgraf* analysis to determine the statute's reach.

Landgraf did not instruct Congress that if Congress failed to enact an express command regarding the temporal reach of the statute, a presumption of prospective application would be triggered. Under *Landgraf*, absence of an express command does not trigger a "presumption of prospective application." Absence of an express command simply triggers the *Landgraf* analysis. *Landgraf*, 511 U.S. at 263.

It is significant that a number of provisions in the Act specify the exact temporal reach of other changes in the Act. Some are fully prospective; some are partially prospective. The important point is that they are express commands. They prove that Congress "was quite capable of and willing to express its intent about" the temporal reach of provisions in the Act when it wished to do so. *Hunter*, 101 F.3d at 1570. Its failure to do so regarding any particular provision requires the court to apply the *Landgraf* analysis. *Id.* at 1569-70. Lindh's argument that the Court must ignore this reality because the Act does not represent a "single author's crafting of a cohesive monograph in nine chapters" (brief of Lindh at 28) is wrong. This Court sits to review the law which appears on

the printed page, not the process by which it was enacted and not its literary quality. *See Landgraf*, 511 U.S. at 263.

Interpreting the law which was enacted, Lindh has utterly failed to show that it contains an express command that 2254(d) is prospective as applied to non-capital or capital, non-opt-in cases. Rather, the Act is silent. Because the statute is silent, the Court must apply the principles articulated in *Landgraf*. Under those principles, 2254(d) applies to pending cases because it does not have a retroactive effect.

III. Section 2254(d) Applies To Pending Cases Because It Does Not Have A Retroactive Effect. It Regulates The Jurisdiction Of The Federal Court To Grant Relief; It Does Not Impair Rights A Party Possessed When He Acted, Increase A Party's Liability For Past Conduct, Or Impose New Duties With Respect To Completed Transactions.

A. A new statute applies to pending cases unless it has a retroactive effect because it attaches new legal consequences to events completed before its enactment.

Because the Act does not contain an express command prescribing the temporal reach of 2254(d), this Court must determine whether Congress intended the provision to apply to pending cases or pre-enactment conduct by determining whether such application would have a retroactive effect or operation. *Landgraf*, 511 U.S. at 277, 280. A new statute applies to pending cases unless it falls within "the class of new statutes that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277.

A statute does not have a retroactive effect merely because it is applied in a case arising from conduct that

occurred before the statute's enactment. A statute does not have a retroactive effect merely because it upsets expectations based on prior law. Even unquestionably prospective statutes can unsettle expectations and impose burdens on past conduct. Not every expectation, hope, or dream is protected from changes in the law. *See Landgraf*, 511 U.S. at 269-70.

A statute has a retroactive effect if it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. "New legal consequences" is a term of art: it does not include any and all perceived negative consequences that would result from application of a new law. New legal consequences are only those which have a particular effect--those that would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at 268-69, 280.

Thus, it is not enough to say that the law was different when the party engaged in certain conduct and that he expected and hoped for the benefits of the law that existed at that time:

> Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 511 U.S. at 269-70. This judgment is informed by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

B. Consideration of the nature and extent of the change in the law leads to the conclusion that 2254(d) does not have a retroactive effect.

1. Examination of the nature of the change in the law focuses first on the function and purpose of habeas.

The judgment that 2254(d) does not have a retroactive effect begins with an examination of the nature of the change in the law. *See Landgraf*, 511 U.S. at 270. That judgment begins with recognition of the reasons the law disfavors statutes that have a retroactive effect. A new statute attaches new legal consequences only if the interest harmed by the new law is an interest that is deserving of protection against a change in the law. *See State ex rel. Briggs & Stratton Corp. v. Noll*, 100 Wis. 2d 650, 663, 302 N.W.2d 487, 494 (1981) (Abrahamson, J., dissenting). Elementary notions of fairness protect legitimate expectations about the legal consequences of conduct. "[I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ." *Landgraf*, 511 U.S. at 265. Individuals should be able to conduct their lives, engage in business, and interact with their fellows and governmental entities, "confiden[t] about the legal consequences of their actions." *Landgraf*, 511 U.S. at 266.

Concerns about retroactivity are essentially concerns about repose and finality. The legal consequences of action once taken should not lightly be undone. *Landgraf*, 511 U.S. at 265. Even if the law under which actions were taken is ultimately invalidated, rights which had become vested under that law and prior determinations under that law which had become final will not be undone. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-75 (1940). Both individuals and governmental entities are generally entitled to rely upon final judgments which

impose legal consequences for past conduct. New legal consequences which give a new statute retroactive effect are only those consequences which destroy legitimate interests in settled expectations, finality, and repose.

Under *Landgraf*, to determine whether a new statute attaches new legal consequences to events completed before its enactment, we first examine the nature of the statute involved. Section 2254(d) defines the authority of federal courts to grant relief from final judgments to state prisoners. Here, the nature of the statute is critical because habeas itself is a vehicle for destroying the repose of a final judgment. Any limitation on habeas in turn serves to protect legitimate settled expectations, finality, and repose--the very interests protected by the rules governing the applicability of new statutes to pending cases.

The writ strikes at finality of judgments, which is one of the law's very objects. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *see also Williams v. United States*, 401 U.S. 646, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part). Consideration of the nature of the change in the law involved here requires consideration of the function of habeas corpus.

It is not the purpose of habeas corpus to "assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion). Federal review of state court criminal judgments does not exist to vindicate constitutional rights of the defendant. Vindication of constitutional rights occurs in the state trial and appellate courts, for those courts have primary responsibility for enforcing constitutional rights. *Withrow v. Williams*, 507 U.S. 680, 698-99 (1993) (O'Connor, J., concurring in part and dissenting in part; joined by Rehnquist, C.J.).

All state courts, and state judges, are bound by the Constitution itself to uphold the Constitution and to obey the dictates of the United States Supreme Court which is the "supreme judicial interpreter of the Federal Constitution." *Withrow v. Williams*, 507 U.S. at 723 (Scalia, J., concurring in part and dissenting in part; joined by Thomas, J.). "Absent indication to the contrary, state courts should be presumed to have applied federal law as faithfully as federal courts." *Id.*

"State courts are coequal parts of our national judicial system and give serious attention to their responsibilities . . . ." *Sawyer v. Smith*, 497 U.S. 227, 241 (1990).

> State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office.

Sumner v. Mata, 449 U.S. 539, 549 (1981).

Although at some points in our national history, divisions of value and viewpoints may have indicated that some state judges had an "unsympathetic attitude to federal constitutional claims," this Court has long been

> unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

State courts can be trusted to enforce constitutional rights in criminal proceedings and to apply the principles

articulated by this Court in its decisions interpreting the Constitution. The criminal judgment of a state court, after review by the state's appellate court system and opportunity for review in this Court, is a final resolution of the matters in dispute and rights of the parties that should remain undisturbed.

Nonetheless, Congress has determined that the liberty interest at stake in criminal judgments warrants an extra safeguard--an attack on repose and finality--that is not afforded in other cases. That safeguard is the writ of habeas corpus. It stands as the sentinel of personal liberty to guard against the rare state court which might lapse and fail to uphold the Constitution or fail to reasonably apply the controlling principles of constitutional law. It is in those rare situations that habeas is necessary to afford relief from "fundamentally lawless" imprisonment. *Fay v. Noia*, 372 U.S. 391, 423 (1963). Habeas corpus is "designed to guard against extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring; joined by Burger, C.J., and Rehnquist, J.). Extreme malfunctions in the state criminal justice systems and fundamentally lawless imprisonment exist in those rare situations where the state court ignores or evades controlling federal constitutional principles. It is then that the writ of habeas corpus is needed.

2. Examination of the extent of the change in the law demonstrates that habeas guards against extreme malfunctions in the state criminal justice systems by permitting habeas relief only when a state court has refused to conform to controlling constitutional law or when a state court has failed to reasonably apply controlling constitutional law.

The historic and core purpose of habeas is reflected in *Teague* and its progeny, which recognize that habeas relief is not warranted when state trial and appellate courts conformed to then-existing constitutional standards or when the state courts faithfully applied existing constitutional law. *Teague*, 489 U.S. at 310. Habeas relief is not justified unless the state court refused to reach a result that was dictated by precedent at the time the state conviction became final. *Teague*, 489 U.S. at 301. Habeas relief is not justified if the state court's resolution of the criminal defendant's constitutional claims constitutes a reasonable, good faith interpretation of existing precedent. *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

The body of case law developed by this Court regarding the function of habeas, the limits on the proper exercise of habeas jurisdiction, and the retroactivity of its own decisions on collateral review foreshadows and provides context for determining both the extent of the change expressed in 2254(d) and for determining whether 2254(d) should be applied to cases that were pending when it was enacted.

Lindh correctly concedes that new 2254(d) extends *Teague* and its progeny. The new statute incorporates the *Teague* recognition that state courts are willing and able to enforce constitutional rights and that federal habeas is needed only to guard against the rare state court that

ignores or evades federal constitutional law. *Teague* recognized that the function of habeas is best served by permitting relief only if the state court refused to reach a result dictated by precedent or failed to reasonably apply controlling precedent.

Recognizing that the retroactivity principles of *Teague* define the proper scope of habeas corpus in 2254(d), Congress has now articulated a further limitation on the proper exercise of habeas corpus jurisdiction. Congress has now narrowly limited the circumstances in which a federal habeas court may grant relief to a prisoner in state custody, regardless of whether or not the prisoner overtly seeks the benefit of a "new" rule of law.

The nature of the change in the statute is that it reduces the authority of the federal habeas court to grant relief to a state prisoner. The changes embodied in 2254(d) go further than, but are not critically different from, the Court-developed *Teague* limitations on the exercise of habeas jurisdiction. As the Seventh Circuit explained, 2254(d) preserves the federal court's independent interpretive power to determine whether the state decision is contrary to clearly established United States Supreme Court precedent. The federal court must ensure that the state court adhered to legal principles articulated by this Court. *Lindh v. Murphy*, J.A. 179-80.

> But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts -- when it is, in the standard phrase, a "mixed question of law and fact" -- sec. 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application of" the law.

Lindh v. Murphy, J.A. 180.

Under 2254(d), this Court sets the bounds of what is reasonable under the Constitution. Federal habeas courts must respect and leave undisturbed state court decisions which are within those bounds and which are reasonable. Section 2254(d) reserves "the grave remedy of upsetting a judgment entered by another judicial system after full litigation" for "grave occasions." *Lindh v. Murphy*, J.A. 182.

Similarly, the Fifth Circuit has held that the "unreasonable application" language of 2254(d) means that a federal court cannot grant habeas relief simply because it disagrees with the state court decision, for that would amount to a de novo review. The federal court may not grant relief unless the state court application of controlling precedent is unreasonable. An application of law to facts is unreasonable only if reasonable jurists considering the question would be of one view that the state court decision was incorrect. Thus, the federal court can grant habeas relief only if "a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard v. Johnson*, 97 F.3d 751, 768, 769 (CA5 1996), *cert. denied*, 65 U.S.L.W. 3598 (U.S. Mar. 3, 1997).

Lindh's alternative interpretation of the change wrought by the statutory amendment is to simply read the words "unreasonable application" out of the statute. He offers no theory that would support a conclusion that the Seventh Circuit incorrectly interpreted those words. Rather, he focuses on what he views as the terrible consequences of the Seventh Circuit's interpretation. Lindh says a federal court would have to allow a state court application of law to facts to stand if the state court's decision was reasonable, even if it was "wrong." What he means of course is that the federal court must allow the state court's decision to stand if it was reasonable, even if the federal court believes it was wrong. This Court must reject Lindh's implicit assumption that the federal court is always "right" and the state court is always "wrong." *See*

Lindh v. Murphy, J.A. 182; *see also Arizonans for Official English v. Arizona*, 65 U.S.L.W. 4169, 4173 n.11 (U.S. Mar. 3, 1997) (No. 95-974); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). Justice Jackson explained the humble reality that even the decisions of this Court are not right in any "pure" sense:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

The distinction is important. Under the old law, in areas of application where reasonable jurists could disagree, the habeas statute, as interpreted, allowed a federal court to substitute its judgment for that of the state court. Under the new statute, in areas of application where reasonable jurists could disagree, the federal court is restrained from substituting its judgment for that of the state court. The federal court may not grant habeas relief unless the state court decision is contrary to clearly established United States Supreme Court precedent on a question of law or unless the state court application of that law to the facts is unreasonable.

The nature and extent of the change in the law demonstrate that 2254(d) does not have a retroactive effect because it serves to protect legitimate interests in settled

expectations, finality, and repose. As *Landgraf* instructs, we turn now to consideration of the degree of connection between the new rule and a relevant past event.

C. Consideration of the degree of connection between the new rule and a relevant past event leads to the conclusion that 2254(d) does not have a retroactive effect.

As discussed above, the nature of habeas and the nature and extent of the change rendered by 2254(d) demonstrate that it is a statute which regulates the circumstances in which a federal habeas court may grant relief. This conclusion in turn compels the conclusion that 2254(d) would not have a retroactive effect if applied to pending cases because it does not attach new legal consequences to events completed before its enactment. Focusing now on the "degree of connection between the operation of the new rule and a relevant past event," *Landgraf*, 511 U.S. at 270, the same conclusion is compelled. Section 2254(d) limits the power of the federal habeas court to exercise jurisdiction to grant relief. The operation of the new rule is primarily connected to the future action of the federal court--to grant or deny relief--which has not yet been completed in a pending case. There is no connection between operation of the new rule and a "relevant past event" within the meaning of *Landgraf*.

1. Section 2254(d) does not have a retroactive effect because it is both prospective and procedural.

A new statute has a retroactive effect only if it attaches new legal consequences to events completed before its enactment. *Landgraf* teaches that some categories, or classes, of statutes do not have that effect. Types of statutes which do not operate retroactively because they do not impose new legal consequences on events completed

before enactment include statutes that authorize or affect the propriety of prospective relief and statutes that change procedural rules. *Landgraf*, 511 U.S. at 273-76.

These categories of statutes do not have a retroactive effect because they do not attach new legal consequences to the primary conduct that gave rise to the suit. They do not unsettle the legitimate expectations of or impair the rights of the parties that vested or matured and became unconditional when that underlying conduct occurred. They govern the present and future; they do not seek to disturb and disrupt the past. Section 2254(d) does not operate retroactively and does not attach new legal consequences to completed events for the same reasons that other prospective and procedural statutes do not.

For example, a statute governing the propriety of injunctive relief operates *in futuro*. Therefore, on an appeal in an injunction case, it was appropriate for the reviewing court to apply a statute enacted while the appeal was pending. *Landgraf*, 511 U.S. at 273-74, discussing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). Similarly, 2254(d) governs the propriety of prospective relief: it prohibits issuance of the writ unless certain conditions have been met. *Lindh v. Murphy*, J.A. 167.

Similarly, most procedural statutes apply to pending cases because rules of procedure regulate secondary conduct, not primary conduct. Application of such statutes does not impair rights a party possessed when the conduct underlying the lawsuit occurred, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at 275, 280. Lindh argues that, under prior law, he was entitled to de novo review of his constitutional claims by the federal court, but amended 2254(d) applies a new standard of review in which the federal court may not grant relief unless the state court adjudication is

unreasonable. Characterizing the new statute as imposing a new standard of review undercuts his claim that the statute should not apply to pending cases. A change in the standard of review is properly characterized as procedural. *United States v. Mejia*, 844 F.2d 209, 211 (CA5 1988). Generally, a standard of review governs the conduct of the reviewing court; it does not govern any underlying conduct of the parties to the lawsuit.[6]

Labels are not dispositive: the connection between the change in the law and the conduct regulated is.

2. Section 2254(d) does not have a retroactive effect because it is jurisdictional.

This Court's landmark decision in *Brown v. Allen* recognized that the function and scope of habeas define the jurisdiction of federal habeas courts to grant relief and that jurisdiction is "controlled by statute." *Brown v. Allen*, 344 U.S. at 460 (Reed, J.).

> Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States

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[6]An exception may exist, for example, in the Workmen's Compensation area, where the "standard of review" is viewed as an inextricable and integral part of the substantive contract right created by the Worker's Act. *United States Steel Mining Co., Inc. v. Riddle*, 627 So. 2d 455, 458 (Ala. Civ. App. 1993).

A state prisoner in a federal habeas case has no similar contractual, substantive right arising at the time of injury which might be adversely altered by a change in a standard of review.

> Constitution. [Citations omitted.] Indeed, the jurisdiction given to the federal courts to issue writs of habeas corpus by the First Judiciary Act, § 14, 1 Stat. 81, 82, extended only to prisoners in custody under authority of the United States. It was not until the Act of 1867 that the power to issue the writ was extended to an applicant under sentence of a State court. . . . It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress.

Brown v. Allen, 344 U.S. at 499-500 (Frankfurter, J.).

Specifically, this Court viewed former 2254(d) as a provision defining the jurisdiction of the federal habeas courts. In *Sumner v. Mata*, 449 U.S. at 547 n.2, in the context of applying the statutory presumption of correctness contained in old 2254(d), this Court explained:

> The present codification of the federal habeas statute is the successor to "the first congressional grant of jurisdiction to the federal courts." *Preiser v. Rodriquez*, 411 U.S. 475, 485, 93 S.Ct. 1827, 1833, 36 L.Ed.2d 439 (1973), and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed.2d 126 (1908), and have repeatedly since reaffirmed, "it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded."

The *Teague* limitation on the extent to which new law should disrupt the finality of an otherwise valid state criminal judgment also constitutes a "limitation on the proper exercise of habeas corpus jurisdiction," applicable to both capital and non-capital cases. *Saffle v. Parks*, 494 U.S. 484, 486 (1990).

Accordingly, there can be no doubt that new 2254(d), which prescribes when a federal habeas court can grant relief to a state prisoner, is a jurisdictional statute: it defines (and limits) the federal habeas court's power to act.

There is no reason for this Court to view new 2254(d) as anything other than a limitation on the exercise of federal court jurisdiction. And there is no reason for this Court to stray from its longstanding duty to see to it that the jurisdiction of the federal court, as defined and limited by 2254(d), is not exceeded.

Like the statutory presumption of correctness of state court fact findings in former 2254 and like this Court's *Teague* doctrine, new 2254(d) limits the exercise of federal habeas jurisdiction. *Sumner v. Mata*, 449 U.S. at 547 n.2; *Saffle v. Parks*, 494 U.S. at 486. New 2254(d) does not have a retroactive effect and does not attach new legal consequences to events completed before enactment because, like other jurisdictional statutes, it "speak[s] to the power of the court rather than to the rights or obligations of the parties." *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part), *quoted in Landgraf*, 511 U.S. at 274. *See also United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (CA9 1995).

A statutory change which divests the federal court of the power it previously had to hear a claim or grant relief applies to an action pending on the effective date of the statute. Such application of a jurisdiction-removing statute does not have a retroactive effect.

> Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals

> authorized to hear and determine such rights and liabilities.

Bruner v. United States, 343 U.S. 112, 117 (1952). This is so even if the remaining tribunal left to the litigant is not even a court, but is only an executive agency. *Hallowell v. Commons*, 239 U.S. 506 (1916) (Act removing federal court jurisdiction applied to pending cases, leaving final and conclusive decision to Secretary of Interior); *see also Smallwood v. Gallardo*, 275 U.S. 56 (1927); *Crane v. Hahlo*, 258 U.S. 142 (1922); *Duldulao v. I.N.S.*, 90 F.3d 396, 399 (CA9 1996). Similarly, 2254(d) removes federal habeas jurisdiction to grant relief except in certain situations. The primary tribunals for enforcing federal constitutional rights in the context of state criminal proceedings are the state courts.

A statute authorizing a federal court to hear certain claims or to grant relief in certain circumstances does not create a right or liability. It provides a particular forum for vindicating a right or imposing a liability that is established by another law. So it is here. The federal habeas provisions do not grant, guarantee, or provide constitutional rights. Constitutional rights are granted, guaranteed, and provided by the Constitution. Constitutional rights exist, and remain to be vindicated, whether or not jurisdiction lies in any federal court. The state courts are required, and competent, to vindicate such rights. *Sumner v. Mata*, 449 U.S. at 549; *Stone v. Powell*, 428 U.S. at 493 n.35.

A limitation on federal court jurisdiction to grant habeas relief for a violation of constitutional rights is a limitation on a particular remedy; it is not a limitation on the constitutional rights themselves. If Congress had wholly eliminated federal habeas jurisdiction, as it wholly eliminated federal district court jurisdiction in *Bruner* and *Hallowell*, that ousting of jurisdiction would apply to any cases pending on the effective date of the enactment.

Logically, there is no reason for an act which wholly abolishes jurisdiction to apply to pending cases, but for an act which limits the exercise of jurisdiction not to apply to pending cases.

Lindh claims he had an unconditional right to relief which was triggered the day he filed his federal habeas petition. Lindh concedes that this Court properly applied the new habeas standards to the petitioner in *Felker v. Turpin*, 116 S. Ct. 2333 (1996), because in that case the petition was filed after the Act became law, even though the crime occurred and state court judgments were entered prior to enactment. Presumably, if Lindh had filed his petition after the date the Act became law he would concede that the federal court must apply 2254(d) to his case, even though his crimes occurred and the state court judgments were entered prior to enactment. Thus, he concedes that neither his crime, his trial, nor his state appellate proceedings constitutes a "relevant past event" which has a sufficient connection to the operation of the new law within the meaning of *Landgraf*.

Lindh claims the new law attaches new legal consequences to the filing of his habeas petition which occurred before the date of enactment. He asserts that the filing of the federal lawsuit itself gives him a protectible right. But this Court has unequivocally rejected similar views. If the new law may be applied to those who file habeas suits after the date of enactment, even though the conduct of the state proceedings at issue in the lawsuits occurred prior to enactment, as Lindh concedes it may, then there is no rationale for refusing to apply it to persons whose state court proceedings occurred prior to enactment but who filed their federal lawsuits before enactment. The filing of the lawsuit does not intensify, strengthen, or enlarge the petitioner's rights. *Hallowell*, 239 U.S. at 506. The policies embodied in 2254(d) are no less applicable to suits begun before enactment than to those "begun at a later day" and the act "as little interferes with existing

rights of the petitioners as it does with those of future litigants." *Smallwood v. Gallardo*, 275 U.S. at 61.

Some commentators view federal habeas as expressing Congress's determination that all state prisoners deserve one federal court appeal as of right of their federal constitutional claims and since the United States Supreme Court cannot, as a practical matter, provide direct review in all cases, the federal courts on habeas act as a surrogate for the Supreme Court.[7] To the extent Lindh shares this view, it also undercuts his argument that 2254(d) should not be applied to his case.

It has been long established that Congress can grant and take away the right to appeal. And when a statute eliminates appellate jurisdiction, that ousting of jurisdiction applies to all pending cases, regardless of when the underlying action commenced or when the events giving rise to the underlying action occurred. *See Ex parte McCardle*, 7 Wall. (67 U.S.) 506 (1869); *Felker v. Turpin*, 116 S. Ct. 2333 (1996). *See also American Steel*, 257 U.S. at 201 (Court noted that "[t]he complainant had no vested right in the decree of the District Court while it was subject to review").

Section 2254(d) deprives a federal habeas court of authority to grant relief to a state prisoner except in certain prescribed situations. It governs the present and future conduct of the federal court, not the past conduct of a party. In a pending case, the grant or denial of relief is a future act, not a past act. It speaks to a procedural remedy provided by a court, not to actionable past conduct of a party. Section 2254(d) is a jurisdictional statute. It limits the exercise of federal habeas jurisdiction. It does not attach new legal consequences to events completed

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[7] 1 James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4d (2d ed. 1994).

before enactment and its application to pending cases will not have a genuinely retroactive effect.

3. Section 2254(d) does not have a retroactive effect because it does not divest a habeas petitioner of a vested, mature, or unconditional right to relief or alter the normative scope of a cause of action.

Lindh attempts to avoid the conclusion that new 2254(d) is jurisdictional and does not attach new legal consequences to past acts by asserting that the statute alters his "cause of action" and deprives him of a "vested," "mature," or "unconditional" right to which he was entitled when he filed his habeas petition.

Curiously, Lindh hitches his star not to the date of the underlying conduct (his crime) or alleged injury to him (presumably the date of an adverse state court decision), but to the date he filed his federal habeas petition. He claims that he had a "cause of action" or "right to relief from a constitutional violation" that matured, vested, or became unconditional on the date he filed his habeas petition in 1992, by virtue of filing the petition, before enactment of new 2254(d). But his "cause of action" or "right to relief" is nothing but an unprotected hope of a particular outcome. His theory that the filing of a lawsuit is a "relevant past event" giving rise to a protected "right" to a desired outcome finds no support in law or logic.

The retroactivity rules exist to protect legitimate expectations about legal consequences of conduct and to ensure predictability and stability. Lindh cites many cases in which courts have held that new statutes should not apply, but those cases do not advance his cause. They are mostly cases involving property or contract rights in which the connection between the new law and a relevant past event is easy to perceive. There is no such property or

contract right at issue here. And none of Lindh's cases suggest that the relevant past event is the date a lawsuit was filed, rather than the date the agreement was reached or the conduct at issue occurred.[8] *See, e.g., Bennett v. New Jersey*, 470 U.S. 632, 638-39 (1985) (grant obligations generally should be determined by reference to the law in effect when the grants were made).

Lindh also attempts to latch on to cases in which courts have declined to apply a new law that alters the normative scope of a cause of action. But his analogy fails. Those cases stand for the proposition that a cause of action--such as a negligence or wrongful death claim--depends on the status of the law at the time of injury. The relevant past event is the accident or injury, not the subsequent filing of a lawsuit seeking redress for the accident or injury. The time the lawsuit is filed is not the critical date. The time of injury is the relevant past event because a statute altering a cause of action changes the legal consequences of the conduct that occurred at the time of injury. A statute passed subsequent to the injury attaches new legal consequences if it increases the amount recoverable or makes the defendant liable for actions for which he was not liable under the old law. *See Thomas v. Cumberland Operating Co.*, 569 P.2d 974, 976 (Okla. 1977).

This is precisely the type of harm identified in *Landgraf* and *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), where the change in the Civil Rights Act increased the liability of the employer for conduct which had occurred before enactment. Such statutes have a retroactive effect because they increase a party's liability for past conduct. *Landgraf*, 511 U.S. at 283-84. The provision at issue in *Rivers* altered the normative scope of

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[8]The cases cited in Lindh's brief and "appendix" are too numerous, and too irrelevant, to warrant individual discussion. They can be disposed of categorically, as the State demonstrates.

the law because it created liabilities that had no legal existence before the provision was enacted. *Rivers*, 511 U.S. at 303. That is a new legal consequence within the meaning of *Landgraf*. Nothing comparable occurs if 2254(d) is applied to a pending case in which the events giving rise to the claim occurred prior to enactment or the petition was filed prior to enactment.

Conversely, application of a new statute to reduce the damages the injured party may receive after the right accrued would have a retroactive effect because it would impair a right the party possessed when the relevant conduct occurred. Once a cause of action for negligence accrues, the injured party has a vested property right in the cause of action which is impaired if the right is thereafter reduced. *See generally Martin v. Richards*, 192 Wis. 2d 156, 200-06, 531 N.W. 2d 70, 88-91 (1995); *Lavieri v. Ulysses*, 149 Conn. 396, 180 A.2d 632 (1962); *Kleibrink v. Missouri-Kansas-Texas R.R. Co., Inc.*, 224 Kan. 437, 581 P.2d 372, 378-79 (1978). Lindh has no comparable vested right.

Lindh is hard pressed to identify a degree of connection between the operation of 2254(d) and a relevant past event that is remotely similar to his own analogies. The necessary connection is missing because 2254(d) does not regulate the conduct of the parties in the way that a statute involving discrimination, negligence, wrongful death, contract, or property rights regulates the conduct of the parties or their business. Moreover, those cases involve primary conduct of parties and initial lawsuits to determine the parties' rights and obligations. Habeas is very different. It involves secondary conduct and collateral relief. *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983). In his attempt to fall within the *Landgraf* nonretroactive rule Lindh creates an incredible fiction that he had a "cause of action" or "right to relief" that accrued, vested, matured, or became unconditional upon the filing of the habeas petition itself. Citing *Boria v. Keane*, 90 F.3d 36 (CA2 1996), Lindh

argues that 2254(d) has a retroactive effect simply because its application would result in a different outcome (brief of Lindh at 44). Both Lindh and *Boria* are wrong. *Lindh v. Murphy*, J.A. 168.

Unlike *Landgraf*, *Rivers*, and all the other cases Lindh analogizes to, the change in outcome here is not related to an event or conduct completed before enactment of the new law. Here, any change in outcome which occurs will occur because the federal court has less authority to grant relief--less power to exercise its jurisdiction--under the new law. That change is a change in the power of the court; it is a change in what the court can do in the future. It is not a change in legal consequences of past conduct of a party or a diminution of a vested, mature, or unconditional right of a party.

When we push aside Lindh's emotional rhetoric and the smokescreen of non-analogous cases, Lindh's claim that 2254(d) deprives him of a "right to relief" comes into sharp focus. It is nothing more, nor less, than a claim that he had a "right" to a favorable outcome which he hoped to receive when he filed his petition and which he concedes he will not receive if the new provision is applied.

Lindh's claim is one the law, wisely, does not recognize. "[N]o person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit . . . ." *Chicago & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 76 (1915).

He cannot sustain his assertion that under the law as it existed when he filed his habeas petition in 1992 nothing short of his own death could have divested Lindh "of his right to relief from the constitutional violation in his case" (brief of Lindh at 43).

In the broad sense Lindh urges, this Court's own decisions in the volatile habeas area have operated to

"divest" habeas petitioners of the right to relief they expected to receive when they filed their petitions. In *Stone v. Powell*, state prisoners who fully expected to have their Fourth Amendment claims considered by a federal habeas court when they filed their petitions were told their claims were no longer cognizable on federal habeas. The Court rejected the prisoners' plea to have this new rule apply only prospectively. *Stone v. Powell*, 428 U.S. at 495 n.38.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the state prisoner surely expected to be awarded relief unless the state could prove the error harmless beyond a reasonable doubt when he filed his habeas petition. But this Court held in *Brecht* that a habeas petitioner would not be entitled to relief based on trial error unless he could establish that the error resulted in actual prejudice--that it had substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638. The new standard was applied to Brecht and he was denied habeas relief. *Id.* at 638-39. *See also Teague v. Lane*, 489 U.S. 288 (1989).

These cases demonstrate that a particular habeas petitioner will not always be granted the benefit of the habeas law in effect when he filed his habeas petition. The Court's declaration of a different or new rule is dependent on the Court's interpretation of the scope of habeas relief, as created and intended by Congress. *See Teague v. Lane*, 489 U.S. at 305-09; *Brecht v. Abrahamson*, 507 U.S. at 632-35; *Stone v. Powell*, 428 U.S. at 475-82. Obviously, this Court's imposition of a new or different rule in a habeas case pending before it, in the performance of its duty to interpret and apply Congress's will, does not divest the habeas petitioner in that case of a "vested right." Surely, then, application of a new statute by which Congress itself has limited the circumstances in which a federal habeas court can grant relief cannot be said to "divest" a petitioner

in a pending case of a "vested," mature, or unconditional right.

Lindh's desire to have his claim reviewed under the old law, which is more favorable to him, is understandable. But it is only a desire; it is not a protected interest. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993).

IV. The Court Below Did Not Substitute An Actual Reliance Test Or A Wrongful Presumption Of Retroactivity For Habeas Curtailing Statutes in Place Of The *Landgraf* Principles.

It remains to address two red herrings Lindh casts out in an attempt to distract this Court from the genuine issues presented in this case, which are discussed above. This Court should resist the bait.

A. The court below did not impose a test of actual, individual reliance.

The court of appeals did not substitute an "actual reliance" test for the *Landgraf* "new legal consequences" test. Applying *Landgraf's* teachings, the court concluded that application of 2254(d) to pending cases would not have a retroactive effect because 2254(d) does not attach new legal consequences to events completed before its enactment. *Lindh v. Murphy*, J.A. 162, 172.

The court's ruling that 2254(d) applies to pending cases is a rule for all pending habeas cases; it does not purport to be a rule that requires a factual determination that a particular petitioner did or did not rely on prior law when he filed his petition. The court's opinion does not say that an actual reliance interest is dispositive. It does not say that presence of an actual or legitimate reliance interest will render inapplicable a statute that would otherwise be applicable. And it does not say that the absence of an

actual, or legitimate, reliance interest will render applicable a statute that would otherwise be inapplicable.

Rather, the court simply recognized, as this Court has, that the new legal consequences analysis is guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270. The court discussed reliance interests in the context of distinguishing the Act's new time limits from the provision in 2254(d). *Lindh v. Murphy*, J.A. 168-72. Established case law supports the court of appeals' conclusion that the new one-year time limit should not apply to petitions which were already filed when the Act was enacted and there should be a one-year grace period to permit any habeas petitioner who has not yet filed a first petition to do so. It is inappropriate to apply a new time limit for filing an action to an action that had already been properly filed under prior law. *See Landgraf*, 511 U.S. at 275 n.29. And this Court has advocated that when a new statute of limitations is enacted, the courts must allow a reasonable time after enactment for the commencement of suits upon existing causes of action. *See Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 286 n.23 (1983); *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982).

Lindh argued in the Seventh Circuit that the new law should not apply to him because he made litigation decisions (decisions not to seek further state court relief and not to seek direct review in this Court) in reliance on the kind of review he would get on habeas back in 1992 when he elected to file his habeas petition. Lindh also claimed that it would be unfair to apply the new law to him personally because his case progressed too slowly in the district court. The court of appeals found these claims groundless. It could have simply refused to consider them because individual, actual reliance interests are irrelevant to the *Landgraf* analysis. If the court erred, it erred only

by being too generous to Lindh by discussing his reliance claims at all.[9]

Lindh's exposition[10] that reliance interests are not dispositive is much ado about nothing. The court of appeals agreed that any actual, personal reliance Lindh might have felt he had in the old law is legally irrelevant to the *Landgraf* analysis. This Court should discuss the issue only long enough to express its agreement with that conclusion.

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[9]Having criticized the court of appeals for considering actual reliance, Lindh apparently cannot resist asking this Court to do the same. It should decline the invitation. It is ridiculous to believe that Lindh actually chose to forgo a chance for relief in this Court or the state postconviction courts because he wanted the assurance of de novo relief a habeas petition then provided. Surely, any litigant would take the most expeditious route to freedom. "Release from a conviction or sentence is better sooner rather than later . . . ." *Hunter v. United States*, 101 F.3d at 1573. The State did not knowingly misrepresent facts to the Wisconsin Supreme Court during litigation in that court (brief of Lindh at 46 n.36). Lindh never suggested such a thing until en banc review in the Seventh Circuit. He presents absolutely no explanation for his silence. His belated claim that 2254(d) makes certain factual matters relevant defies understanding. Under the old statute, he could have taken issue with the facts found by the state supreme court. He elected not to do so. He cannot blame that choice on the enactment of the new law.

[10]The State will not individually discuss the many "reliance" cases Lindh presents. It is sufficient to note that they are irrelevant, he overstates their holdings, and his "appendix" of case law grossly violates this Court's rules. Sup. Ct. R. 24(3) (counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief).

B. The court below properly considered the nature of federal habeas relief in concluding that 2254(d) applies to pending cases.

This Court should reject Lindh's complaint that the court of appeals improperly replaced the *Landgraf* analysis with an improper "presumption." The court of appeals applied the *Landgraf* analysis and properly concluded that 2254(d) applies to pending cases.

The court of appeals rejected Lindh's claim that he had a vested right in the law which governed at the time he filed his federal habeas petition. In rejecting Lindh's argument, the court considered both the nature of federal habeas and the nature of 2254(d). This is precisely what *Landgraf* instructs. *Landgraf*, 511 U.S. at 270 (court must consider the nature and extent of the change in the law).

The court of appeals recognized that federal habeas is not designed to leave settled matters in repose. The federal habeas petitioner has no interest in the finality of the state court judgment he attacks; the very purpose of a habeas petition is to overturn a final and presumptively valid state judgment. *Lindh v. Murphy*, J.A. 164-66, quoting *Lockhart v. Fretwell*, 506 U.S. at 372-73. Section 2254(d) limits the disruptive effects of habeas by limiting the circumstances in which a federal habeas court can grant relief. Thus, 2254(d) makes the final state judgment more stable. *Lindh v. Murphy*, J.A. 164. It makes perfect sense that a provision which is designed to make final judgments more stable and secure would apply to existing judgments. The court of appeals simply recognized this logic: "In other words, legal changes that reduce the willingness of federal courts to set aside judgments presumptively apply to existing judgments." *Lindh v. Murphy*, J.A. 166. The court's logic is unassailable. Because the purpose of 2254(d) is to curtail collateral relief and to augment the finality of state judgments, there is a

strong implication that it should apply to "existing judgments." *Id.*

Lindh chastises the court of appeals for finding support in the case law of this Court which

> consistently applies statutory changes in the law of collateral attack to pending cases, and perforce to newly filed cases that seek relief from judgments entered before the statute's enactment.

Lindh v. Murphy, J.A. 166. But he fails to cite a single case where this Court has, in fact, declined to apply changes in the law limiting collateral attack to pending cases.

At one point (brief of Lindh at 48-49), Lindh suggests his rights were determined by the state court proceedings which occurred before the habeas petition was filed. But if that is correct, *Felker v. Turpin*, 116 S. Ct. 2333, is wrong. *Felker* applied the new habeas provisions to a petition filed after the Act's enactment date, even though the state court proceedings were completed before that date. Lindh concedes *Felker* is correct, and distinguishable from his own case, because in *Felker* the petition was filed after the Act became law. Lindh's suggestion that his rights attached before his habeas petition was filed is therefore directly contrary to *Felker*. Lindh's primary theory is that the date the petition was filed is the critical date for determining the applicability of 2254(d).[11] The state has already illustrated the defects in this theory and will not repeat all of the argument here.

Lindh is simply wrong. The filing of the habeas petition does not cause any right to mature or become unconditional. The filing of the petition does not

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[11]This view has been rejected by the courts. *See Leavitt v. Arave*, 927 F. Supp. at 399 n.4.

determine the rights of the party. The filing of the petition is simply a request to the federal court to grant relief. Whether the court has authority to grant that writ depends on the statute in existence when that federal court exercises its authority--when it grants or denies relief. That current authority is embodied in 2254(d), and any federal court granting or denying relief after the enactment of 2254(d) is limited by the terms of 2254(d). Section 2254(d) defines the grounds upon which the federal court may grant habeas relief. It is the time of the federal court's decision, not the time when the state court proceedings occurred or the time when the habeas petition was filed, which matters.

This is what *Landgraf* teaches. Section 2254(d) does not operate retroactively upon pending habeas cases because it attaches no new legal consequences to events completed before enactment. It imposes new legal strictures on current and future events--on pending habeas cases and habeas cases yet to be filed.

Characterizing the question somewhat differently yields the same result. Instead of asking whether 2254(d) attaches new legal consequences to events completed before enactment, let us ask, "what is the relevant activity that the rule regulates?" *Rivers v. Roadway Express*, 511 U.S. at 291 (Scalia, J., concurring; joined by Kennedy, J., and Thomas, J.) Section 2254(d) regulates the federal court's activity of granting, or denying, habeas relief. It is a jurisdictional statute, which limits the federal court's authority to grant habeas relief. As Justice Scalia explained:

> [T]he purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power--so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo

> past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Id. at 293.

Accordingly, here, the relevant event for purposes of determining whether 2254(d) applies is the point at which the federal court exercises its power to grant or deny relief. It is not the point at which the crime, the state court proceedings, or the filing of the petition occurred. A federal habeas court exercising its statutory power to grant or deny relief can exert only the power it possesses at the time it acts. Hence, if a federal habeas court exercises its authority to grant or deny relief after the effective date of the new habeas Act, as the court of appeals did here, it is constrained to exert only the limited power given to it by 2254(d).

Section 2254(d) limits the jurisdiction of a federal habeas court by depriving the federal habeas court of authority to grant relief to a state prisoner except under narrowly prescribed circumstances. The court of appeals properly applied 2254(d) to Lindh's case, which was pending before it when 2254(d) became law. Under the limitations imposed on the court by 2254(d), the court of appeals properly denied Lindh's request for habeas relief.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this Court to affirm the decision of the United States Court of Appeals for the Seventh Circuit.

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(8)

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In The

Supreme Court of the United States

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") on April 24, 1996. The Act's habeas corpus title, *inter alia*, amends 28 U.S.C. § 2254(d). The questions on which the Court granted review are:

I.

Whether the court of appeals correctly concluded that Congress, despite an explicit provision in § 107(c) of the Act, failed to specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases?

II.

If so, whether the court of appeals correctly supplanted this Court's antiretroactivity presumption, triggered by new legal consequences attached to completed events, with a presumption that habeas-curtailing statutes apply retroactively and a test for retroactive effects that requires proof of actual reliance?

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REPLY BRIEF FOR PETITIONER

The court below interpreted the 1996 Act as replacing the previous habeas corpus cause of action, established by (1) custody and (2) a constitutional violation, with a new cause of action requiring proof, in addition, that (3) the state court's adjudication not only was "erroneous" as a matter of federal constitutional law but was "grave[ly]" erroneous.[1] The State and its *amici* admit this,[2] and also that the court of appeals applied its radical reading of the 1996 law to deny Aaron Lindh's 1992 petition on the ground that the state court's resolution of his Confrontation Clause claim "cannot be called 'unreasonable' " even

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[1] JA 181, 182; *Hennon v. Cooper*, 1997 WL 114438, at *5-*6 (7th Cir. Mar. 14, 1997) (circuit decision in "*Lindh* . . . commands deference to the state court's judgment . . . [unless it is] 'unreasonable,' which is stronger than 'erroneous' and may be stronger than 'clearly erroneous' "; relief denied despite "deficient" "reasoning" of state court decision and basis to "think [its] determination incorrect"). The State and its *amici* openly lobby for the lower court's interpretation of § 2254(d). RB 20-24; CJLF 3-16; WLF 2-11. Because the Court expressly excluded the question of the correctness of that interpretation from its grant of certiorari, the devotion to it of half of two briefs is utterly inappropriate. So would it be for the Court to address the issue without first giving Lindh a fair chance through briefing and argument to show that the proffered interpretation is demonstrably incorrect and unconstitutional.

[2] While dwelling on selected features of the writ's history prior to *Johnson v. Zerbst*, 304 U.S. 458 (1938), and on selected contemporary issues that are notably absent from Mr. Lindh's case (such as those addressed by *Teague v. Lane*, 489 U.S. 288 (1989) and harmless-error doctrine, *e.g.*, RB 36; WLF 5-6), none of the opposing briefs disputes for a moment that, "[a]t least since *Brown v. Allen*, 344 U.S. 443 (1953)" and until April 23, 1996, Lindh had an unconditional statutory right to relief from custody based upon a constitutional violation. CJLF 7; see RB 6, 23; WLF 6.

though members of the majority as well as the dissenting judges below "believe" that it was "wrong." JA 197, 203.[3] Because the State and its *amici* disavow the lower court's revisionist interpretation of *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994),[4] substituting their own, reply is required.

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[3] The Confrontation Clause issue is not before the Court, but the State and CJLF address it, misstating the record. RB 2-4; CJLF 29-30. When Dr. Roberts provided the State with its only testimony that Lindh had no mental disease, (1) the State was investigating felony charges against Roberts that had led the State Medical Board to move to withdraw his license and the University Hospital to ask for a criminal investigation (the order in limine forbade questions about the Hospital's suspension of Roberts as well as the State's criminal investigation of him); and (2) Lindh's prosecutor had favored Roberts with a decision *not* to suspend his employment and investigate but instead to continue his retainer on Lindh's case and let someone else investigate. Three months after Lindh's trial, the State reduced multiple felony charges against Roberts to a single misdemeanor to which Roberts pled guilty, and a judge in the same court where Lindh was tried withheld a prison term because of Roberts' services to the State in cases like Lindh's. JA 8-13, 22-44, 76-77, 85, 197, 217.

[4] *E.g.*, RB 37-39 (declining to defend lower court's limitation of "new legal consequences" to frustrated reliance interests); WLF 4, 19-20 (reasonable "means of assessing the potential unfairness to some litigants of applying amended . . . § 2254(d) to . . . pending habeas cases" places Lindh within "categories of habeas petitioners . . . most likely to" deserve to "be exempted" from new law).

The State's "representative sampling" of lower court cases is not. Cf. RB 12 n.4. Four circuits have held that § 2254(d) does *not* apply to pending cases, including *Mackall v. Murray*, 1997 WL 134374, at *4 (4th Cir. Mar. 25, 1997). See Pet. Brf. 11 n.10. Two circuits have applied it. The Eleventh Circuit has reserved the issue. *Hunter v. United States*, 101 F.3d 1565, 1572 n.5 (11th Cir. 1996).

I. The State Misreads *Landgraf*'s Step One to Saddle Congress with an Onerous Redundancy Requirement

Under *Landgraf*, the first step in analyzing the temporal reach of a statute is to determine "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. The State and *amici* treat the adverb *expressly* as a term of art, meaning "through words taken wholly out of context and without reference to the ordinary rules for reading statements made in the English language." *E.g.*, RB 9-10. We believe, conversely, that the quoted phrase from *Landgraf* means nothing more or less than that a court should begin by considering whether the statutory text explicitly addresses the question of the statute's application to classes of cases defined by temporal criteria, and, if the text does so, the court should obey the manifest English-language meaning of that text.

The text of Title I of the 1996 Act explicitly addresses the question of the applicability of the Act's habeas revisions to classes of cases defined by temporal criteria. Title I enacts two distinct sets of revisions – a new Chapter 154 and several amendments to preexisting Chapter 153 – and then states in § 107(c) that the new "Chapter 154 shall apply to cases pending on . . . the date of enactment of this Act." The meaning of § 107(c) is no less "express" than the meaning of the statement "Give me two large cokes to go, one with ice" – although both statements assume familiarity with normal English usage and a hearer motivated to make sense instead of nonsense of what's said. Congress commonly assumes no less; *Landgraf* certainly demands no more.[5]

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[5] See *United States v. Wells*, 117 S. Ct. 921, 927 (1997) ("first criterion in the interpretive hierarchy, [is] a natural reading of the full text"). Lindh does not "deliberately commingle[ ]" (cf.

RB 10) *Landgraf*'s Step One ("expressly prescribed" temporal scope) and Step Three ("clear congressional intent") but discusses them simultaneously to avoid repetition. Because § 107(c) expressly prescribes Title I's temporal reach – and § 2264(b) expressly prescribes § 2254(d)'s – Step One subsumes Step Three. And were it determined that §§ 107(c)'s and 2264(b)'s treatment of temporal reach were not sufficiently "express," their language pointing in that direction would supply the single most important consideration in the statutory construction that Step Three requires.

Four issues that the State and its *amici* raise in regard to Step Three – none bearing on Step One – deserve mention. (1) Under *Landgraf*, and also as a matter of logic, " 'where the congressional intent is clear, it governs' " in Step Three. *Landgraf*, 511 U.S. at 264. This is true whether Congress' clear intent rebuts the presumption against giving a new law retroactive effect or, *a fortiori*, when there is no " 'timeless and universal' " presumption to be overcome, and Congress' clear intent is to follow the usual rule that new laws apply in the future. *Id.* at 265. Courts accordingly must follow Congress' clear " 'statutory direction' " to apply a new law only in future cases even if the law's application to pending cases would not be "retroactive." *Id.* at 277; accord, WLF 19; cf. RB 10.

(2) The State (RB 12) ignores the explanation for limiting the pending cases governed by Title I to those brought by *capital* prisoners who are given *special litigative resources* in state court. 28 U.S.C. § 2261. By focusing on pending *capital* cases, Congress pinpointed the cases causing a logjam. See Bureau of Justice Statistics, Federal Habeas Corpus Review 16-25 (Sept. 1995) (capital, not noncapital, cases cause delay). By focusing on prisoners given *special resources in state court*, Congress could rely on those resources to neutralize the unfairness that retroactive application would cause – while concluding, as to cases in which extra resources were *not* provided, that "the potential unfairness of retroactive application . . . [is not] an

II. Nothing the State Says or Cites Changes the Fact that Applying Section 2254(d) Would Deprive Lindh of a Matured and Unconditional Cause of Action and Thus Attach New Legal Consequences to Pre-Enactment Events

The State chiefly relies on a single, patently result-oriented proposition – that a new law's effects qualify as

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acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272-73.

(3) What *does* remain unexplained is respondent's rationale for reading 28 U.S.C. § 2264(b) so as to destroy the States' incentive to provide special resources and thus "opt-in" to Chapter 154. For respondent's version of § 2264(b) would concededly deny opt-in States the benefit of the Act's beefed up exhaustion rule, the presumption of correctness of state factfindings, *and* § 2254(d) in the large class of habeas cases in which prisoners rely on "a factual predicate that could not [previously] have been discovered through the exercise of due diligence." *Id.* § 2264(a)(3); see, *e.g.*, *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *Dobbs v. Zant*, 506 U.S. 357 (1993); *Amadeo v. Zant*, 486 U.S. 214 (1988). Nor does CJLF's comparison of the Powell Commission's § 2259 and the 1996 Act's § 2264(b) explain the latter. Cf. CJLF 19, A-1. To the contrary, this "apples and elephants" comparison simply begs the question why Congress in March and April 1995 – just when it added § 107(c) – dropped the Powell Commission's hearing provision and added an entirely unrelated section incorporating into Chapter 154 three Chapter 153 provisions that by CJLF's own admission apply of their *own* force "in *all* [habeas] cases." CJLF 16. The only imaginable reason – the only one that avoids "emasculat[ing] an entire section," cf. *Bennett v. Spear*, 117 S. Ct. ___, ___, 1997 WL 119566, at *11 (Mar. 19, 1997) – is to make two Chapter 153 provisions, which do not *generally* apply to pending cases, apply to pending *opt-in* cases pursuant to § 107(c).

(4) Despite CJLF's misleading obfuscations (CJLF 17), the partial prospectivity provision in § 903(c) of the Act does not apply to § 108 or any other part of the habeas title (Title I); and it was added by a different House of Congress almost a year after

retroactive "only if the interest harmed by the new law is . . . *deserving*" in the light of the reviewing court's policy preferences. RB 16 (emphasis added). That is not *Landgraf*'s test. *Landgraf*'s Step Two asks whether "events completed before enactment" caused a legal right to have matured or become unconditional as a matter of pre-enactment law, and whether application of a new law would "attach *new* legal consequences" to those pre-enactment events. 511 U.S. at 270 (emphasis added).[6] If so, the new law's application is "retroactive" and impermissible absent "clear congressional intent" – whatever the court's own policy preferences might be. *Id.* at 283.

Here, two crucial facts clearly make § 2254(d)'s application to Mr. Lindh retroactive under *Landgraf*; and the State disputes neither of them: *First*, events occurring no later than July 9, 1992 when Lindh filed his petition (and, possibly, well before then) gave Lindh an unconditional right to relief from custody under the preexisting habeas

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Title I and § 107(c) were finalized. See 142 Cong. Rec. H2187-88 (Mar. 13, 1996); Pet. Brf. 28 n.17.

[6] See, *e.g.*, *Bennett v. New Jersey*, 470 U.S. 632, 639-40 (1985) (determinative retroactivity event is when "pre-existing right to recovery" " 'had matured or become unconditional' "); *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (when individual acquired "affirmative enforceable right"); *Bradley v. School Bd.*, 416 U.S. 696, 720 (1974) ("The Court has refused to apply an intervening change to a pending action where . . . do[ing] so would infringe upon or deprive a person of a right that had matured or become unconditional."); *Greene v. United States*, 376 U.S. 149, 153, 160 (1964) (when "petitioner's rights . . . matured and were asserted"); *United States v. Magnolia Petr. Co.*, 276 U.S. 160, 162 (1928) (when "claims fixed in accordance with earlier provisions"); *Crane v. Hahlo*, 258 U.S. 142, 145 (1922) (when right to relief "became complete"); *United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 315 (1908) (when "respective rights of the parties [were] settled").

statute. For nothing thereafter could occur (under pre-Act law) that would attach to his unconstitutional custody any legal consequence but federal habeas relief. And, *second*, to apply amended § 2254(d) as interpreted below would attach the *opposite* legal consequence, because § 2254(d) more "narrowly limited the circumstances in which a federal habeas court may grant relief" (RB 21) by giving the State a " 'modified res judicata' " defense (CJLF 15) that "substantially alters [Lindh's] federal habeas 'cause of action' " (WLF 17).

Apart from appealing to policy preferences, the State offers only three arguments for exempting § 2254(d)'s new legal consequences from the *Landgraf* rule: (1) that the presumption against giving retroactive effect to rules of decision enacted by supervening statutes is limited to rules affecting "primary conduct" rather than "secondary conduct" – and a remedy for the unconstitutional acts of another court is ineluctably "secondary" (RB 25, 34); (2) that some other label – "procedural," "jurisdictional," "prospective" – applies to § 2254(d) and exempts it from the *Landgraf* rule (RB 24-32); and (3) that the "event[ ] completed before . . . enactment" to which § 2254(d) attaches new legal consequences occurred *earlier* than Lindh suggests (RB 32). Each argument is taken up below.

A. The Habeas Remedy for State Court Constitutional Violations Is No Less Protected by Non-retroactivity Norms than Statutory Remedies for Other Harms

The State and *amici* badly mischaracterize the role of state court decisions in federal habeas proceedings both before and after the 1996 Act. They portray amended § 2254(d) as dealing with "secondary conduct" because, in their view, the habeas statute merely apportions responsibility for remedying a legally cognizable harm

between state and federal court adjudication.[7] In this depiction, " '[p]rimary conduct' is the conduct of people in the ordinary course of life . . . [– i]n the present case, . . . Aaron Lindh entering the City-County Building with a gun," whereas " '[s]econdary conduct' is the conduct of adjudication . . . [– i]n the present case, . . . Lindh's trial." CJLF 23-24.

But of course the *primary* conduct in a federal habeas case is precisely the state court adjudication that places a petitioner "in custody in violation of the Constitution." 28 U.S.C. § 2241(c)(3). The petitioner's right to federal habeas relief is created by, and depends solely upon, the entry of an unconstitutional state court adjudication subjecting him or her to incarceration. Federal habeas courts in state prisoner cases "have never been" concerned with adjudicating guilt or with the legality of any other sort of "primary conduct" than the state court commitment order which is the basis for a petitioner's imprisonment. *Herrera v. Collins*, 506 U.S. 390, 400-01 (1993).

Both before and under the 1996 Act, the writ has provided a remedy for unconstitutional actions occurring in the process of state court adjudication leading to a petitioner's incarceration. That adjudication thus cannot *stand in for* the federal habeas remedy, any more than USI Film Product's disregard of Barbara Landgraf's "complaints to her immediate supervisor" that another

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[7] They do not carry this conception to the next logical step of arguing that laws which alter a court's standards for reviewing its own or another court's actions may never affect "primary" conduct or matured rights protected by antiretroactivity norms. That step would make the basic flaw in their category structure too obvious, in the light of cases like *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1456 (1995) (new law changing circumstances under which judge could reopen lawsuit held unconstitutionally "retroactive").

employee was harassing her could stand in for her Title VII remedy. See *Landgraf*, 511 U.S. at 248.

There is another reason why the State's argument won't wash. Even were the writ a remedy for some legally redressable "primary conduct" other than the state court's unconstitutional adjudication, and even were the state court's adjudication a prior and overlapping remedy for that conduct, a new law's application to revoke the second remedy in a case in which the prior remedy previously had been available would still be "retroactive" under *Landgraf*.[8] An example makes the point. Assume that C citizen's property is seized by federal agents at a time when federal statutes provide two alternative remedies for unlawful seizures: an action in the district court for return of the property (with a six-month statute of limitations) and an action for money damages for unreturned property in the Court of Claims (with a three-year statute of limitations). Then, two years after the seizure of C's property, Congress enacts a new statute, silent on the issue of retroactivity, that (i) shortens the statute of limitations for the Court of Claims action to

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[8] *Landgraf* itself held that a compensatory damages remedy is a new legal consequence though it overlaps an existing backpay remedy, because compensation might be awarded when backpay is not. 511 U.S. at 281-83. And Congress would not be presumed to withdraw such a remedy retroactively, any more than to add one, by a statute that was silent on the issue. See *id.* at 284 n.36; Pet. Brf. 40 n.29. And the fact that a discrimination victim had unsuccessfully pursued a statutory right to backpay in the EEOC prior to suing in court to enforce the same right would not neutralize the retroactive effect of applying a new law to withdraw the judicial right of action after administrative remedies were exhausted and a complaint was filed in court. See, *e.g.*, *Rafferty v. City of Youngstown*, 54 F.3d 278, 284 n.3 (6th Cir. 1995); *Maitland v. University of Minnesota*, 43 F.3d 357, 362-63 (8th Cir. 1994).

18 months, or (ii) limits recovery of damages in the Court of Claims action to cases in which the agents who seized the property not only seized it unlawfully but were unreasonable in believing that they had a lawful basis for the seizure. The destruction of an "accrued" and "existing cause[ ] of action" by hypothesized change number (i) is, of course, a paradigmatic case of the kind of new legal consequence that Congress is presumed *not* to intend.[9] And the destruction of an accrued right of action by hypothesized change number (ii) is indistinguishable from that worked either by change number (i) or by applying the 1996 Act to deny Mr. Lindh's 1992 petition. See, *e.g.*, *Greene v. United States*, 376 U.S. 149, 160-63 (1964); Pet. Brf. 40-42 & nn.29, 33.[10]

Although the State and its *amici* cite cases they say would require the application of hypothesized changes (i) and (ii) to destroy matured causes of action, they can do so only by not stating the facts (*e.g.*, RB 29-31) or misstating them (CJLF 23, 26-27). For example, *Bruner v. United States*, 343 U.S. 112 (1952), dismissed a pending overtime-pay suit in the district court on the basis of a new law confining such suits to the Court of Claims only after finding – both as to the class of such cases *and* as to Bruner's *own* case – that "Congress has not altered the

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[9] *United States v. St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926); see, *e.g.*, *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry.*, 266 U.S. 435, 437 (1925); *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 598 (1873).

[10] It makes no difference that C thus far has not received relief because s/he has not yet sought it, while Lindh thus far has been denied relief because of a constitutional error committed when he did seek it. In both cases, prior law made the absence of relief a prerequisite to the remedy that the new law withdraws.

nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Id.* at 117. Similarly, in *Hallowell v. Commons*, 239 U.S. 506 (1916), the Court applied a supervening law in dismissing a pending suit to declare Hallowell the heir of a deceased Native American only after finding that the law substituted a new, administrative route to the same relief and thus had "not extinguish[ed] any liability incurred under" the former law or "take[n] away [a] substantive right, but simply change[d] the tribunal that is to hear [Hallowell's] case." *Id.* at 508. And in *Crane v. Hahlo*, 258 U.S. 142 (1922), the Court upheld the application of a new law changing the process of reviewing an assessor's decision from one set of judicial and administrative remedies to another only after finding that "a substantial and efficient remedy *remains*." *Id.* at 146-47 (emphasis added).[11] The principle that no new legal

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[11] See also *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part) (retroactivity concerns are absent where law "speak[s] to the power of the court, *rather than* to the rights or obligations of the parties" (emphasis added)); *Bell v. New Jersey*, 461 U.S. 773, 777 n.3, 782 n.7 (1983) (new law applies when it "merely change[s] the forum for assertion of a pre-existing right" and " 'takes away no substantive right' "); *Smallwood v. Gallardo*, 275 U.S. 56, 61-62 (1927) (new law applies to bar federal suit challenging local tax because law "is not like a provision that *no action* shall be brought upon a contract previously valid, which in substance would take away a vested right," but instead "leave[s] the taxpayer with[ ] power to resist" the tax in local courts (emphasis added)); *Sherman v. Grinnell*, 123 U.S. 679, 680 (1887) (new law applied because petition it barred "was not brought until after [new law] went into effect" and state forum remained); *Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 573-74 (1870) (dismissing suit filed directly in federal court because plaintiff could litigate same suit in state court or in federal court

consequence occurs when Congress replaces the remedy that was available in the past with a "substantial and efficient remedy [that] *remains*" does not countenance – rather, it affirmatively forbids – amended § 2254(d)'s application to annul entirely *any* "remain[ing]" remedy for Aaron Lindh's matured cause of action.

B. Section 2254(d) Is Not Procedural, Jurisdictional or Prospective, Nor Would its New Legal Consequences Be Permissible if it Were

As *Landgraf* makes abundantly clear, it does not adopt a jurisprudence of labels – "procedural," "jurisdictional" or "prospective" – but instead a functional test that asks whether or not new legal consequences would attach to completed events.[12] Accordingly, even if any of those labels applied here – none do – the State's effort to affix them to § 2254(d) would be pointless. For each is operative for retroactivity purposes only if it is read correctly – namely, "*merely* procedural," "*merely* jurisdictional" or "*merely* about prospective relief" (since any statute abrogating a matured cause of action completely

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on removal from state court); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (new law applied to withdraw Court's power to hear habeas appeal because Congress clearly intended to affect pending cases and constitutional objections were met by Court's continuing jurisdiction to hear such cases on original writ).

[12] 511 U.S. at 270, 274 n.27, 275 n.29; see also *id.* at 291-92 (Scalia, J., concurring in the judgment). In Justice Brandeis's words, "[t]hat a statute shall not be given retroactive effect, unless such construction is required by explicit language . . . is a rule of *general* application [which] has been applied by this court to statutes governing procedure. . . . " *United States v. St. Louis, S.F. & T. Ry.*, 270 U.S. at 3 (emphasis added); see Amicus Curiae Brief for the United States at *16 & n.8, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 1996 WL 744847 (No. 95-1340).

also has the procedural effect of destroying the jurisdiction of the previously cognizant court to afford relief on that cause of action in the future). And the change in law worked by amended § 2254(d) as construed below is self-evidently not *merely* any of these things.

Not "merely procedural." The State and its *amici* themselves rule out any characterization of § 2254(d), as interpreted below, as "merely procedural," because thus interpreted it "admittedly reduces the likelihood that a habeas petitioner will be granted relief" (RB 12) by creating a " 'modified res judicata' " defense[13] (CJLF 15), which "substantially alters the federal habeas 'cause of action' " (WLF 17). As the Court has long recognized, the creation or withdrawal of defenses to matured causes of action and all similar changes are both "substantive" and "retroactive." See, *e.g.*, *Winfree v. Northern Pac. Ry.*, 227 U.S. 296, 301-02 (1913).[14]

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[13] " 'Res judicata is an affirmative defense. . . . ' " *Hagen v. Utah*, 510 U.S. 399, 409 (1994).

[14] The State asserts that new "standards of review" are procedural and can change without imposing new legal consequences. RB 26. The only case it cites, however, *United States v. Mejia*, 844 F.2d 209 (5th Cir. 1988), applied a new *judicial* precedent reversing an old one, *id.* at 211, thus simply illustrating the " 'familiar' " principle, that, while "statutes operate only prospectively, . . . judicial decisions operate retrospectively." *Rivers v. Roadway Express*, 511 U.S. 298, 311-12 (1994). As the cases cited in Lindh's opening brief at 41-42 n.33 make clear, this Court and the lower courts have consistently treated standards of review as substantive, not only for retroactivity but also for *Erie* purposes. See also, *e.g.*, *Gasperini v. Center for Humanities*, 116 S. Ct. 2211, 2221 (1996) (*Erie* case); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 n.15 (1958) (same); *Baines v. Swenson*, 384 F.2d 621, 623 n.3 (8th Cir. 1967) (refusing to apply new statutory standard of review *on habeas* of state court factfindings because "federal petition was filed

Not "merely jurisdictional." Even were § 2254(d) jurisdictional, it would not fall within the Court's retroactivity cases addressing "*merely* jurisdictional" changes, such as *Bruner*, *Hallowell*, and *Crane*. For as we demonstrate above, applying the court of appeals' interpretation of § 2254(d) to Lindh's 1992 petition does not "*merely*" replace the existing remedy for his matured cause of action with a new, "substantial and efficient remedy." *Crane*, 258 U.S. at 147. Rather, it entirely "takes away" any remedy. Cf. *Hallowell*, 239 U.S. at 508.

In any event, "§ 2254(d) is not, in fact, a jurisdictional statute" (WLF 19) – as every court of appeals to address the issue has held.[15] When the habeas statute (pre- and post-1996) intends to withdraw jurisdiction, it does so explicitly through language such as "[n]o circuit or district judge shall be required to entertain," 28 U.S.C. § 2244(a), and "no Federal court thereafter shall have the

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before" new law was enacted); *McDonald v. Kropp*, 373 F.2d 549, 556 n.1 (6th Cir. 1967) (similar). Nor does the immediate application of the 1919 harmless error law avail the State. Cf. CJLF 25. Rather than imposing *new* legal consequences, the 1919 law codified the Court's longstanding harmless error rule, from which some lower courts recently had deviated. Compare *Tevis v. Ryan*, 233 U.S. 273, 289 (1914) (affirming judgment computing damages erroneously because "error was harmless . . . [and] rule adopted made no substantial difference in the result") and *Markham v. United States*, 160 U.S. 319, 325 (1895) (similar) with Rep. of ABA Spec. Comm. to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, 2 A.B.A. J. 603, 605 (1916) (proposing harmless error statute to bring practice in aberrant circuits into line with traditional "American rule").

[15] See, *e.g.*, *Davis v. Executive Dir.*, 100 F.3d 750, 755 n.1 (10th Cir. 1996); *Farmer v. McDaniel*, 98 F.3d 1548, 1549 n.1 (9th Cir. 1996); *Rehbein v. Clarke*, 94 F.3d 478, 481 n.4 (8th Cir. 1996); *Emerson v. Gramley*, 91 F.3d 898, 900 (7th Cir. 1996).

authority," *id.* § 2262(c). Section 2254(d) uses no such language. Rather, § 2254(d)'s terms are borrowed *verbatim* from the neighboring – *non*jurisdictional – exhaustion provision, § 2254(b).[16]

Not "merely prospective." Similarly, the State and its *amici* cannot sensibly call the writ "prospective" while conceding that "[t]he essence of habeas corpus . . . is that the petitioner asks the court to nullify a *previous* decision."[17] CJLF 5. Nor is § 2254(d) itself prospective but, instead, "quintessentially backward-looking." *Landgraf*, 511 U.S. at 282; see § 2254(d) (relief depends on whether "a *State court* . . . adjudication . . . *resulted* in a decision that *was* contrary to . . . established Federal law").

The single case on which the State and *amici* rely – *American Steel Foundries v. Tricity Cent. Trades Council*, 257 U.S. 184 (1921) – seals the point. As it clearly explains, laws affecting injunctions do not attach new legal consequences to "events *completed before* [their] enactment" (*Landgraf*, 511 U.S. at 270) "because . . . [an] injunction operates in futuro and the right to it must be determined as of the *time of the hearing*." *American Steel Foundries*, 257 U.S. at 201 (emphasis added); see Pet. Brf. 41 n.32. Because injunctions depend on conditions in existence at

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[16] Sections 2254(b) and (d) both provide that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless [certain conditions are met]." See *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (exhaustion statute is nonjurisdictional); cf. *Felker v. Turpin*, 116 S.Ct. 2333, 2338 (1996) (rule that jurisdictional "[r]epeals by implication are not favored" applies to 1996 Act).

[17] See, *e.g.*, *Pitchess v. Davis*, 421 U.S. 482, 489-90 (1975) (*per curiam*) (federal habeas court may order state court to correct prior invalid conviction by retrying or releasing petitioner but may not supervise state court's compliance with order as if it were an injunction); cases cited in Pet. Brf. 48-49 & n.40.

the moment they are issued, and may be modified or terminated whenever conditions change, neither the right to obtain one nor the right to keep one in force can "mature[ ] or become unconditional" until the moment the court acts. As we emphasize in the next section, the same is *not* true of Lindh's preexisting right to habeas relief – nor do the State and its *amici* claim that it is.

C. Applying Section 2254(d) as Read Below Would Attach New Legal Consequences to "Events Completed" Before Enactment on Either of the Two Admissible Understandings of the Events that Made Mr. Lindh's Rights Mature and Become Unconditional

The State criticizes Lindh because, it says, he specifies the filing of his petition, rather than "the date of an adverse state court decision" (RB 32), as the completed, pre-Act event to which the application of amended § 2254(d) would attach new legal consequences. The State misunderstands Lindh's position.

There are a number of conditions precedent to the maturing of a habeas cause of action. See Pet. Brf. 48-49. Two of those conditions are satisfied by actions of the petitioner and the courts: (1) entry of an unconstitutional state court adjudication subjecting the petitioner to incarceration – which simultaneously satisfies the "constitutional violation" prerequisite to habeas jurisdiction, 28 U.S.C. § 2241(c)(3), and the exhaustion of remedies prerequisite to habeas relief, § 2254(b); and (2) this Court's denial of certiorari or the expiration of the time for seeking it – which eliminates the exclusive alternative of a merits ruling on certiorari that would bar subsequent habeas consideration of any decided claim under

§ 2244(c).[18] A third possible condition precedent is the existence of "custody," which satisfies the final prerequisite for habeas jurisdiction, § 2241(c)(3), and makes habeas corpus causes of action – unlike most others – dependent upon a condition that is alterable up to the moment the petition is filed but not thereafter. See *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas "jurisdiction . . . attache[s]" if petitioner is in custody when "application was filed" and "is not defeated by [petitioner's subsequent] release").

In most cases (including Lindh's), these conditions are satisfied in the order described – so that the latest point at which the cause of action can be said to have matured and become unconditional is when an individual in custody files his or her petition. In some cases, however, filing *precedes* the exhaustion of state remedies, *e.g.*, *Sharpe v. Buchanan*, 317 U.S. 238, 238-39 (1942) (remanding for merits adjudication of petition that became exhausted in state court while federal case was pending on appeal), or, at least, the denial of certiorari or the expiration of the time for seeking it (as when a prisoner files a habeas petition within weeks of the state direct appeal decision).

The operation of the habeas statute thus permits only two sensible understandings of the point at which the habeas cause of action has " 'matured or become unconditional.' " *Bennett v. New Jersey*, 470 U.S. at 639. *Either* the determinative "events [are] completed" (*Landgraf*, 511 U.S. at 270) when state remedies have been exhausted and certiorari has been denied (or the time for seeking it has expired). *Or alternatively*, the determinative events are completed when, in addition to the exhaustion of state remedies and the denial of certiorari, the "custody" prerequisite has been satisfied by the filing of the petition

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[18] The cited statutes are reproduced in Pet. Brf., App. A.

while the petitioner is under restraint. Only under the latter approach would filing usually (although not always) mark the point when the determinative "events [are] completed"; and, even then, it would not be the filing *per se* but the conjunction of the filing and custody that is decisive.

Both approaches provide a bright line that is administrable on the face of any petition that conforms to the Rules Governing § 2254 Cases. The first approach (exhaustion and denial of certiorari) has the added virtues of being (1) consistent with the Court's established "finality" jurisprudence under *Teague v. Lane*, 489 U.S. 288, 305 (1989), (2) independent of the contingencies of filing and of custody's susceptibility to mooting circumstances beyond the control of the petitioner and the courts (*e.g.*, parole decisions), (3) productive of the same outcome as the different formulation of the decisive retroactivity event in Justice Scalia's concurring opinion in *Landgraf*,[19] and (4) coherent with the roles of certiorari

[19] Justice Scalia focuses on the "relevant activity that the [*new*] rule regulates" as revealed by the rule's "purpose." 511 U.S. at 291 (Scalia, J., concurring in judgment). As interpreted below, § 2254(d)'s purpose is to accord "deference" to state adjudications of a certain type – *i.e.*, adjudications "on the merits" that, even if "wrong," are not "grave[ly]" so. § 2254(d); JA 197, 181; see WLF 18 (§ 2254(d)'s "clear purpose . . . is to place more responsibility in the hands of the state courts, in adjudicating claims of constitutional violations," and "by placing greater trust in the state courts, . . . [to] make it even more likely that those state courts will vigorously protect the constitutional rights of their citizens" and that "this Court [will do the same] on writ of *certiorari*"). Under Justice Scalia's approach, therefore, the relevant events are the state court's provision of the specified type of adjudication and the immunization of that adjudication from revision by this Court.

and habeas as alternative remedies[20] – one discretionary with the Court, one a matter of right – concerned with rectifying identical constitutional violations occurring in the course of state court adjudications, with the habeas as-of-right remedy becoming unconditional when the alternative discretionary remedy ceases to be available.

The alternative approach (exhaustion, denial of certiorari, and the conjunction of custody and filing) has none of these virtues. It does, however, conform to the "cases pending" line in § 107(c) and to a number of the Court's retroactivity precedents.[21]

[20] See, *e.g.*, *Reed v. Farley*, 114 S. Ct. 2291, 2297 (1994); *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in the denial of certiorari); *Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in the denial of certiorari).

[21] In a number of cases cited by *Landgraf* as authoritative, the new law in question postdated some formal action taken by a party to effectuate a cause of action, and the court said or implied that the right's formal "assert[ion]" was the event to which the new law would attach new legal consequences. *Greene v. United States*, 376 U.S. at 153, 160 ("petitioner's rights matured and were asserted" upon filing of administrative petition); see *Bennett v. New Jersey*, 470 U.S. at 637, 639-40 (government's claim " 'had matured or become unconditional' " when it issued "determination letter" demanding that grantee return money); *United States v. Magnolia Petr. Co.*, 276 U.S. at 162 (taxpayer's "claims [became] fixed in accordance with earlier [statutory] provisions" when it filed demand for repayment of excessive taxes); *United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. at 315 ("respective rights of the parties [were] settled, and the cause of action [was] already in existence" when subcontractor demanded payment from contractor); *Dash v. Van Kleeck*, 7 Johns. 477, 479-80, 483-84, 494 (N.Y. 1811) (Kent, C.J.) (adopting view that "plaintiff at the commencement of his suit, had a vested right of recovery against [defendant]"); see also *Sherman v. Grinnell*, 123 U.S. at 679-80 (no retroactivity problem where petition that new law

The Court needs not choose between these alternatives in order to decide this case. Under either, Aaron Lindh's habeas corpus cause of action matured and became unconditional at least four years before § 2254(d) became law.

CONCLUSION

The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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April 4, 1997

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forbade litigant to file "was not sued out . . . until April 8, 1887, which was after [the March 3, 1887] statute").

No. 96-6298

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Supreme Court, U.S.
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AARON LINDH,

Petitioner

vs.

JAMES P. MURPHY,

Respondent

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded over 35 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring the correctness and fairness of criminal convictions. Among NACDL's objectives are to promote the proper administration of justice and to ensure that statutes are construed and applied in accordance with due process.

Letters from the parties to this case expressing their consent to the filing of this brief are on file with the clerk.

QUESTION PRESENTED

Whether the court of appeals correctly concluded that Congress, despite an explicit provision in §107(c) of the Act, failed to specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases; and, if so, whether the court correctly interpreted this Court's retroactivity jurisprudence to depend upon proof of actual reliance interests and to create a presumption that habeas-curtailing statutes apply retroactively?

STATEMENT OF THE CASE

The petitioner, Aaron Lindh, is a state prisoner serving a life sentence. After his conviction in state court, he argued on appeal that his conviction had been obtained in violation of the Confrontation Clause of the Sixth Amendment. The state supreme court rejected that argument and affirmed the conviction in a decision reached in 1991.

In 1992, Mr. Lindh petitioned the United States District Court for the Eastern District of Wisconsin for a writ of habeas corpus. When that court denied relief, he appealed to the United States Court of Appeals for the Seventh Circuit.

On April 24, 1996, approximately two weeks after a circuit panel heard oral argument, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 into law. Pub. L. 104-132, 110 Stat. 1214 [hereinafter the Act]. The circuit court set the case for reargument en banc in order to consider the bearing one of the Act's amendments to Chapter 153 of the Judicial Code, §104(3), 110 Stat. 1219 (to be codified at 28 U.S.C. §2254(d), might have on Mr. Lindh's case.

Upon reargument, the circuit court decided that the Act fails to prescribe the cases to which §2254(d) applies and that, accordingly, that new section is applicable to this case unless its application would be retroactive. Finding no retroactive effects, the circuit court applied §2254(d) and on that basis denied relief, even though Mr. Lindh filed his petition well before the date on which the Act became law. Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996)(en banc).

Mr. Lindh sought review of that judgment, and this Court granted certiorari limited to the threshold question of §2254(d)'s applicability.

ARGUMENT

The question before the Court actually embraces two divisible questions, the one contingent upon the other. Initially, the Court must decide whether the circuit court erred in interpreting the Act to be silent regarding its own temporal reach. If the Court concludes that the Act reaches only cases initiated after its effective date, there will be no occasion for passing on to the second question--whether, if applied to this pending case, §2254(d) would have retroactive consequences within the meaning of Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994).

The petitioner, Mr. Lindh, challenges the circuit court's interpretation of the Act. He contends that the Act does address the applicability of its chapters on habeas corpus and that it clearly makes its amendments to preexisting habeas statutes (codified in Chapter 153 of the Judicial Code) inapplicable to cases pending at the time of enactment. Since §2254(d) is an amendment to Chapter 153, that new provision is inapplicable here.

We think the threshold statutory construction question is dispositive and therefore limit this amicus curiae brief to that issue. The circuit court was mistaken. The Act does prescribe its own temporal reach and, in explicit terms, disclaims the applicability of its amendments to Chapter 153, including §2254(d), to cases like this one.

Accordingly, the Court should reverse the judgment below on that basis alone and should remand with

instructions to consider Lindh's appeal without reference to §2254(d). Landgraf, 114 S.Ct. at 1496 (explaining that absent constitutional prohibition clear text governs a statute's applicability).

I. THE ACT MUST BE CONSTRUED ACCORDING TO ITS EXPLICIT TEXT RATHER THAN THE RHETORIC THAT ATTENDED ITS ENACTMENT

It is no secret that the 104th Congress was sharply divided along ideological lines. That fact of political life explains much about how and why the Act was passed, but very little about its actual content.

The vigorous polemics regarding the habeas corpus chapters of the Act certainly generated more heat than light. The debates in committee hearings and on the floor occurred at a level of generality well above the details of particular sections of pending bills. Typically, members of the House and Senate focused on the undifferentiated need for habeas corpus reform, on the notorious inefficiencies associated with habeas litigation, on the relative competence of federal and state courts, and on the virtues and vices of the death penalty.

The press, in turn, faithfully reported the aspects of the political process thought to be newsworthy. That typically meant the most colorful, quotable statements made by members attempting to exploit the process for political advantage. Newspaper and television accounts invariably featured theatrics that might entertain the public at large. Rarely did reporters delve into the more technical (and less accessible) details of the provisions under discussion.

The result is understandable. The Act is widely understood to enshrine a fiercely anti-habeas ideology. In the public mind, this new statute is neither more nor less than a collage of relentlessly repressive measures meant to bedevil habeas corpus petitions at every turn. The popular conception is that this must be so--because published reports of the process from which the Act emerged led the country to believe that it would be so.

In particular, the provision of the Act implicated here, §2254(d), already has the reputation of a general rule of "deference" to the state courts on the merits of constitutional claims. See Drinkard v. Johnson, 97 F.3d 751, 767 n.21 (5th Cir. 1996)(dismissing the suggestion that after such a long and vitriolic assault on habeas in the debates Congress could have enacted anything other than a radical bill). At least the lower court in this case has avoided that baseless characterization. See Lindh, 96 F.3d at 868 (noting that §2254(d) says nothing about "deference" to state court decisions regarding the meaning of constitutional rights).

Now, in any event, the klieg lights are off, the angry voices are silent, and only the enacted product remains. This Court's focus is not on what Congress might have done, nor on what some members would have done, nor, indeed, on what anyone thought was done. All that counts now is what actually was done--what Congress actually put in the statute books.

As this Court made clear in Landgraf itself, the national majoritarian democracy in the United States operates only when proponents of particular policies marshal majority votes in both houses of Congress, present their product to the President, and achieve, at the least, his acquiescence. Landgraf, 114 S.Ct. at 1496 (explaining that

"even the will of the majority does not become law unless it follows the path charted in Article I"); see INS v. Chadha, 462 U.S. 919 (1983)(invalidating one-House vetoes).

Legislators who propose (or oppose) public policies come to naught if they merely inject their views into committee reports and floor speeches, but lack the political muscle it takes to put hard language in the text of a statute.

Debating points and press releases may be many things good and fine; they may, indeed, be evidence of certain individuals' "intentions" with respect to legislative action. But they are not law. And it is only law that this Court can recognize and interpret--the law the Court finds on the printed page that emerges at the end of the legislative day. United States v. R.L.C., 112 S.Ct. 1329, 1339 (1992) (Scalia, J., concurring)(joined by Thomas J.); Musick, Peeler & Garrett v. Employees Ins., 113 S.Ct. 2085, 2096 (1993)(Thomas, J., dissenting) (joined by Blackmun & O'Connor, J.J.) (explaining that "[c]ourts should not treat legislative...silence as a tacit license to accomplish what Congress...[is] unable or unwilling to do").

Statutory construction demands attention not only to the dictionary definitions of isolated terms, but also to the overarching scheme in which terms are located. For the meaning of statutory language, "plain or not," depends on the context in which the language is used. King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991).

In this instance, the Court must look hard at the precise text of the Antiterrorism Act and respect that text as positive law. In so doing, the Court must take account of other statutory provisions governing federal collateral litigation--both provisions that have been added by the new Act and provisions that have been on the books for years and

were not disturbed by the new law. United States Savings Ass'n v. Timbers of Inwood Forest Ass'n, 484 U.S. 365, 371 (1988) (explaining that a statutory provision "that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme").

It is not just that preexisting provisions retain the authority they have always had. The 1996 Act constitutes a thoroughgoing appraisal of virtually every aspect of litigation in this field. In the context of such a comprehensive overhaul of the entire system, Congress has sometimes left longstanding provisions intact and has thus confirmed their role in the framework the 1996 legislation sets in place.

Even a complex legislative package like this one must be understood to be internally coherent. This Act, for all its intricate provisions, cannot and need not be read to generate irrational or unfair results that serve no discernible policy. On the contrary, this new legislation can be read, and is entitled to be read, to advance the public policies identified by its own explicit terms and structure--divorced from exploitive rhetoric and uncritical press accounts of political maneuvering.

When the Act is interpreted according to its precise text, the pragmatic results will look rather different from what the public has been led to expect. On examination, §2254(d) is not a warmed-over version of the oft-failed proposal to bar federal habeas relief if a prisoner's claim was "fully and fairly adjudicated" in state court. Nor is §2254(d) the initiative that was advanced in the House in the 104th Congress. By contrast, §2254(d) represents a compromise between different camps of habeas reformers--a compromise necessary to win passage of a general reform bill in 1996.

See Yackle, A Primer on the New Habeas Corpus Statute, 44 Buffalo L. Rev. 381, 422-43 (1996).

Just as the Court must consider the Act's explicit text when it construes specific substantive provisions in cases to which they apply, the Court must also attend to the Act's text with respect to the threshold question here--whether the Act prescribes a new provision's application in the first instance.

As Justice Thomas has explained, the Court cannot determine a statute's "coverage" by asking what Congress "'would have wanted to enact'" but must, instead, "look to the extant text of the statute and see what Congress has in fact, and not in theory, enacted." Morse v. Republican Party of Virginia, 116 S.Ct. 1186, 1234 n.18 (1996) (Thomas, J., dissenting) (joined by the Chief Justice and Kennedy & Scalia, J.J.).

II. THE ACT MAKES ITS AMENDMENTS TO CHAPTER 153 INAPPLICABLE TO CASES PENDING ON THE DATE OF ENACTMENT

As Mr. Lindh explains in the party brief, §107(c) of the Act explicitly addresses the applicability of its changes in habeas corpus law and makes only the new Chapter 154 applicable to pending cases. The Act thus speaks directly to the issue here and resolves it in Mr. Lindh's favor. On that basis alone, this Court should reverse.

The circuit court below mischaracterized Mr. Lindh's straightforward reading of the Act to depend on a negative implication. Far from it. Mr. Lindh simply reads §107(c) to draw a line between habeas provisions of the new Act that

will apply to pending cases (the provisions in Chapter 154) and habeas provisions that will apply only to future cases (the amendments to the preexisting provisions of Chapter 153).

The point of a provision like §107(c) is to identify a field of operation (here, the habeas corpus sections of the Act) and to classify items within that field into different categories according to some distinguishing characteristic or characteristics (here those provisions that apply to pending cases and those that do not).

When, accordingly, a rule like §107(c) draws a classifying line around a category, it necessarily and logically excludes what it does not include. To insist that such a rule addresses only what it affirmatively includes and is silent regarding what it excludes is to credit only half the rule's meaning. If statutory construction worked the way the circuit court suggests, federal legislation would have to be routinely repetitive. Every rule that defines a category and explains the matters that fall into that category would have to be followed by a redundant reminder that other matters do not.

That is not the way statutory construction works at all. By contrast, classifying rules are and must be read to operate in both directions--and thus to entail both what the definition of a category includes and, as well, what that definition necessarily excludes.

This particular provision, §107(c), no more operates by negative implication than any other provision in the Act. For example, §106 establishes the "gatekeeping" mechanism with which this Court dealt in Felker v. Turpin, 116 S.Ct. 2333 (1996). By its terms, that provision applies only to

cases in which prisoners wish to file second or successive habeas petitions. No one would say that it is inapplicable to cases in which prisoners file initial petitions merely by negative implication--in an attempt to disparage that obvious conclusion. Certainly, no one would propose on any such basis that the "gatekeeping" device might be read to control initial-petition cases--on the specious ground that the Act nowhere affirmatively disclaims that result.

Federal statutes cannot and need not compulsively spell out their range of application redundantly in their every provision. Rather, a complex enactment like the Antiterrorism Act sensibly addresses the "applicability" issue when and where clarity demands--when, this is to say, the Act sets forth a series of changes in habeas corpus law and then specifies, for purposes of those changes, precisely how the transition will proceed.

That is what the Act does in this instance. When the Act turns to its changes in the law of habeas corpus, it offers a single, clear statement of the adjustments that will apply to pending cases and, necessarily, the provisions that will not affect cases already under way.

The new Chapter 154 might have been thought to govern only future habeas petitions. As Mr. Lindh explains, that new chapter is triggered only if a state establishes a mechanism for supplying indigent death row prisoners with competent counsel for state collateral proceedings. Given the necessity of such a systemic change, it might have appeared that Chapter 154 would only be available in after-filed habeas actions. It was essential to clarity, then, that the Act specify that a state might previously have established a qualifying system that could trigger Chapter 154 in cases already in the pipeline.

The Act's amendments to Chapter 153, by contrast, would not be likely candidates for application to pending cases and, in the absence of a (surprising) provision to the contrary, it is perfectly clear that they are inapplicable to ongoing proceedings. For when the Act makes adjustments in preexisting provisions, it plainly acknowledges what has gone before and reconciles its additions in a way that minimizes disruption--that is, by creating a transition period during which pending cases can pass through the system unaffected.

The Act presupposes the basic habeas jurisdiction established by the 1867 Act, now codified in §2241 and reaffirmed in §2254(a), as well as the general habeas structural arrangements that have been developed over many years. Concomitantly, the Act recognizes habeas cases under way at the time of enactment and thus already being processed according to the existing provisions of Chapter 153.

The new law acknowledges the serious difficulties that would attend any change in the law governing those pending cases and, accordingly, explicitly isolates its changes in Chapter 153 (including §2254(d)) from the entirely new Chapter 154--the availability of which can be, and is, handled differently. Moreover, the Act recognizes the differences between prisoners already engaged in federal litigation under Chapter 153 and those who may be subject to the new Chapter 154. Prisoners in the latter category are necessarily on death row. They form the backlog of capital cases the Act plainly means to dislodge--as soon as possible and with the aid of the new provisions in Chapter 154 in states that qualify. Prisoners in the former category are typically serving prison terms and thus are not the prime

targets of the Antiterrorism and Effective Death Penalty Act at all.

The immediate application of Chapter 154 to death row prisoners in qualifying states may be justifiable on yet another ground. By hypothesis, prisoners whose cases are governed by Chapter 154 have had the benefit of competent lawyers in previous proceedings in state court and, in that way, have received some help in clearing the new hurdles that Chapter 154 establishes--e.g., tight filing deadlines.

By contrast, prisoners serving prison terms have not (necessarily) received any additional help in coping with litigation, and it is unfair to saddle them unilaterally with the new requirements established by the amendments to Chapter 153.

This is the way legislation enacted in the wake of Landgraf might have been expected to be framed. See Landgraf, 114 S.Ct. at 1498 (contemplating that Congress weighs the benefits of applying new legislation to pending cases against any disruption or unfairness that may result).

Indeed, the very point of Landgraf was to provide Congress with a sensible background rule on which to rely: "Congress [has] responsibility for fundamental policy judgments concerning the proper temporal reach of statutes" and (subject to constitutional restraints) can have its way simply by making its will known. Landgraf, 114 S.Ct. at 1501. With this background rule in place, it is untenable for the circuit court blithely to read the Act to be silent regarding a matter over which Congress has baseline authority to rule.

Of course, on this threshold question of applicability, the Act is not subject to any exaggerated "clear statement"

rule. Congress is obliged to employ especially exacting language only if it wishes to make new legislation retroactive in the Landgraf sense. Retroactive legislation is extraordinary, and it is for that reason that the Court's default position is that statutes will not be given retroactive effect in the absence of clear statement. Here, the only question is whether the Act prescribes the perfectly ordinary practice of introducing amendments to preexisting statutes only prospectively. It does.

This is not only what §107(c) says and what it means. It is also what makes sense. Making the Act's amendments to Chapter 153 prospective accomplishes two complementary ends. First, it avoids dislocations in cases already being processed under preexisting law and thus keeps the enactment of new reform legislation from perversely making habeas litigation more, not less, complex and time-consuming.

In this case, the parties dispute the nature and extent of the consequences that would follow from invoking §2254(d) so late in the day. Yet no one doubts that the application of that new provision here would have implications of a significant order. By specifying that §2254(d) is prospective only, the Act eliminates those difficulties in a single stroke--while nonetheless changing habeas corpus law in various respects for the future. The Act thus serves its policy goals (making federal habeas faster and more efficient) both in the near and in the long terms.

Second, making the amendments to Chapter 153 prospective also conserves resources. It relieves the federal courts of the duty and responsibility to determine whether the application of a provision like §2254(d) would have

retroactive effects--effects that would trigger the presumption against retroactive statutes.

Here again, the parties' arguments in this case are instructive. Enormous federal judicial effort has already been expended on the question whether invoking §2254(d) would attach new legal consequences to previous transactions in Mr. Lindh's case. Clearly, the resolution of that question demands careful, disciplined (and time-consuming) analysis. On reflection, none of that work was necessary. The Act does not require it, but explicitly disclaims it by making §2254(d) inapplicable here, irrespective of whether it would have retroactive effects if it were applied.

Just as the Act makes the inquiry into §2254(d)'s retroactive effects unnecessary, it makes similar investigations of the effects of other amendments to Chapter 153 equally unnecessary. But for the prospective-only character of all those provisions, they, too, would be subject to equally burdensome examination to determine any retroactive effects their application would entail.

Moreover, by the circuit court's account of the "retroactivity" inquiry, the demands on judicial resources would be multiplied many times over. The circuit court insists that the federal habeas courts must investigate the retroactive effects of amendments to Chapter 153 not only amendment-by-amendment, but also case-by-case. According to that court, the only effects that count as retroactive are those that upset reliance interests. That means, of course, that the history of each individual case would have to be investigated ad hoc in search of particularized instances in which prisoners relied on prior law to their detriment.

In the end, and certainly if the circuit court's approach were sustained in its entirety, "retroactivity" issues touching §2254(d) and various other amendments to Chapter 153 would command federal litigation well into the future, squandering scarce resources in the questionable pursuit of frustrated reliance interests peculiar to individual cases. And in this way, too, the Act's undisputed purpose to expedite and streamline federal collateral litigation would be frustrated.

Whenever new legislation is enacted, there is always a shakedown period during which new policies and procedures are assimilated into the system. That is obviously the case here, but, equally obviously, this transition season, too, will pass. The Act mitigates disruptions and conserves resources by giving its amendments to preexisting provisions of Chapter 153 prospective effect only.

This is the pragmatic framework contemplated by Landgraf, and it would be a serious mistake to let the noise surrounding the Act's adoption drown out the message contained in the Act's actual text.

CONCLUSION

For the reasons given above, the Court should reverse the circuit court's judgment and remand with instructions to consider Mr. Lindh's claim without regard to §2254(d). The Act expressly bars that provision's application to a case like this one, in which the petition for habeas relief was pending on the date of enactment. This conclusion is dispositive, and the Court need consider no other issue.

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Does new subdivision (d) of 28 U. S. C. § 2254, added by the Antiterrorism and Effective Death Penalty Act of 1996, apply to cases pending on the date of enactment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AARON LINDH,

Petitioner,

vs.

JAMES P. MURPHY, Warden,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the right of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on the final judgment of a state court based on arguments fully considered and fairly resolved there, within the limits in which reasonable, conscientious judges can differ. Such unwarranted attacks on final judgments are contrary to the rights of victims and society which CJLF was formed to protect.

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1. CJLF has written consent of both parties to file this brief.

SUMMARY OF FACTS AND CASE

The City-County Building in Madison, Wisconsin includes offices of both the city police and the county sheriff. On January 15, 1988, Aaron Lindh met with police officers. He then went out to his car, got a gun, walked into the sheriff's office, and shot three people, killing two of them. Joint Appendix ("J. A.") 89-90 (opinion of Wisconsin Supreme Court). A jury convicted Lindh of two counts of murder and one count of attempted murder, plus two weapons charges. J. A. 88. In a separate proceeding, Lindh argued that he was not guilty by reason of a mental disease, a claim the jury rejected. J. A. 88-89.

One of the expert witnesses for the state regarding Lindh's mental condition at the time of the shooting was Dr. Leigh Roberts. Dr. Roberts had interviewed Lindh on the day of the shootings and two times thereafter. J. A. 90-95. During this period, Dr. Roberts learned he might be accused of engaging in improper sexual conduct with a female patient. J. A. 93. To avoid a conflict, the district attorney transferred that investigation to another county and had no further involvement in the matter. J. A. 94-95. The trial judge granted a motion *in limine* preventing cross-examination on this topic, finding that its probative value, if any, was outweighed by its prejudicial effect. J. A. 98-99. Dr. Roberts' testimony at trial was reinforced by a second expert, Dr. Fosdal, who testified that Lindh had a personality disorder, not a mental disease, and did not meet the criteria for the mental defense. J. A. 100-101.

On appeal, Lindh argued that the trial judge unduly restricted the cross-examination of Dr. Roberts because the allegations were relevant as a potential source of bias. J. A. 82. The Court of Appeals reversed on state law grounds, without reaching the constitutional question. J. A. 82. The Supreme Court of Wisconsin reversed the appellate court and affirmed the conviction. J. A. 122. One justice dissented. J. A. 128. Lindh filed a collateral attack in federal court. The District Court "agree[d] wholeheartedly with the analysis of the Wisconsin Supreme Court." J. A. 150.

While Lindh's appeal was pending, the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") was signed into law. *Lindh* v. *Murphy*, 96 F. 3d 856, 860 (CA7 1996). The

Court of Appeals held that the Act's amendments to 28 U. S. C. § 2254(d) applied to Lindh's habeas petition. *Id.*, at 867. Applying the amended statute, the Court of Appeals affirmed the District Court's denial of Lindh's petition. *Id.*, at 877.

SUMMARY OF ARGUMENT

New subdivision (d) of 28 U. S. C. § 2254 establishes a "middle ground" rule of preclusion, lying between res judicata and *de novo* review. This rule is analogous to the rule preventing relitigation on a section 2255 petition of an issue resolved on appeal. It ends the practice of the lower federal courts treating the judgments of state courts as if they were inferior courts.

The statute says nothing about the temporal extent of the Chapter 153 amendments, including the section at issue in this case. Section 107(c) of the bill, by its terms, applies only to section 107. Subdivision (b) of 28 U. S. C. § 2264 is derived from a proposal which did not include any amendments to section 2254; hence, the "retroactivity" of those amendments could not be its purpose, as petitioner contends.

Under the "default" rules of *Landgraf* v. *USI Film Products*, the new statute applies to pending cases. It is a procedural change. It governs prospective relief. It shares with jurisdictional changes the characteristic that makes them applicable to pending cases.

The present case illustrates the wisdom of the new rule and the value of applying it to pending cases.

ARGUMENT

I. Section 2254(d) establishes a modified res judicata rule.

The Court's order granting certiorari in this case limited the question to the application of 28 U. S. C. § 2254(d) to pending cases, denying review of the Seventh Circuit's interpretation and application of that provision. See Pet. for Cert. i; J. A. 233. However, since the answer to the question presented depends on "the nature and extent of the change in the law," *Landgraf* v.

USI Film Products, 511 U. S. 244, 270 (1994), some discussion of that change is essential.

A. The Dual Nature of Habeas as a Collateral Attack.

Petitioner places a great weight on the statement of *Ex parte Tom Tong*, 108 U. S. 556, 559-560 (1883) that a habeas petition is "a new suit brought . . . to enforce a civil right . . . ." Brief for Petitioner 12. His discussion of the effect of application of the statute as divesting a "matured cause of action," see *id.*, at 39-44, is based on this characterization of habeas as a new, independent suit as opposed to a quasi-appellate continuation of the criminal case.

Counsel for petitioner is apparently a recent convert to this point of view. Elsewhere, he has emphatically proclaimed the appellate nature of habeas corpus. See 1 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 2.4b, p. 23 (2d ed. 1994); Liebman, Apocalypse Next Time: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2091-2092 (1992).

Actually, habeas corpus is something of a curious hybrid.[2] In form, it is a civil action against the jailer. In substance, though, it is a request for one court to nullify a decision of another court, and in that sense it is appellate.

The dual nature appears in the earliest cases. The Supreme Court can issue original habeas writs, despite its very limited original jurisdiction, because such writs in practice revise the decisions of other courts and thus are appellate in nature. *Ex parte Bollman*, 4 Cranch 75, 101 (1807); *Ex parte Watkins*, 7 Pet. 568, 572-573 (1833) ("*Watkins II*"); see also *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 838, 116 S. Ct. 2333, 2339 (1996) (discussing original habeas writs as part of appellate jurisdiction). However, in the absence of actual appellate jurisdiction to review a judgment, the unreversed final

2. We refer in this discussion to habeas petitions by persons in custody pursuant to court order. When habeas is used to dispute private custody, see, *e.g.*, *Ex parte Barry*, 2 How. 65, 65 (1844), or arrest by the executive without judicial authorization, see *Ex parte Vallandigham*, 1 Wall. 243, 251-253 (1864), it is purely an original action.

judgment of a court of competent jurisdiction originally could not be reversed on habeas, *Felker*, 135 L. Ed. 2d, at 839, 116 S. Ct., at 2340 (quoting *Ex parte Watkins*, 3 Pet. 193, 202, 207 (1830) ("*Watkins I*")), not even on constitutional questions. See *Watkins II*, 7 Pet., at 574 (Eighth Amendment attack on judgment). Early cases granting habeas relief involved nonfinal commitment orders, see *Bollman*, 4 Cranch, at 76, or jurisdictional questions. See *Ex parte Milligan*, 4 Wall. 2 (1866) (civilian tried by military court); see also *Watkins I*, 3 Pet., at 208 (distinguishing *Bollman* and other cases as not involving final judgments).

The essence of habeas corpus as a collateral attack is that the petitioner asks the court to nullify a previous decision. The rules governing the granting of such relief are therefore rules governing the effect in one proceeding of a decision rendered in another. This question is not unique to habeas corpus; it arises in all areas of law.

B. Treatment of Prior Adjudication.

The question raised by a prior decision of an issue produces an entire spectrum of answers. *De novo* reconsideration and res judicata preclusion are the endpoints of this spectrum, but there are a number of responses in between. Thus, the fact that the first court's decision is not res judicata does not necessarily entitle the litigant *de novo* reconsideration. In some circumstances, a first judgment which is not res judicata can nonetheless "be considered, and even given controlling weight." *Salinger* v. *Loisel*, 265 U. S. 224, 230-231 (1924).

De novo review is the general rule when an appellate court directly reviews the decision of a lower court on a question of law. *Elder* v. *Holloway*, 510 U. S. 510, 516 (1994). At the other end of the spectrum, the final judgment of a court of competent jurisdiction generally precludes relitigation of the issue between the same parties, regardless of the relative status of the two courts and regardless of the importance of the question. See *Allen* v. *McCurry*, 449 U. S. 90, 105 (1980) (state court holding on federal constitutional question has collateral estoppel effect in federal civil suit).

Not all direct review is *de novo*, however. On some issues, appellate courts only ask whether the trial court's decision was clearly erroneous. These issues are designated questions of fact. See *Pierce* v. *Underwood*, 487 U. S. 552, 558 (1988). However, "the practical truth" is that this label "is sometimes as much a matter of allocation as it is of analysis," *Miller* v. *Fenton*, 474 U. S. 104, 113-114 (1985), and the classification may turn on determinations about "the sound administration of justice." *Id.*, at 114. Confidence or lack of confidence in the first tribunal may be the real ground for the classification. *Ibid.*

Outside of the direct review context, an example of a "middle ground" standard is the doctrine of the law of the case. When an issue decided once is brought up again in the same case, either in the same court or a coordinate court, the general rule is that the issue will not be redecided unless the first decision was clearly wrong. The second court (or second judge or panel of the same court) need not agree with the initial decision. So long as that first decision is "plausible," the second court's "inquiry is at an end." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 819 (1988). There are exceptions to the rule when the facts are found to be materially different on retrial or when the governing law has changed in the interim. See 1B J. Moore, Moore's Federal Practice ¶0.04[1], pp. II6-II9 (2d ed. 1996).

A second type of "middle ground" preclusion arises when a prisoner seeks to relitigate within the same judicial system a question decided against him on appeal. For federal prisoners, this is done via a motion under 28 U. S. C. § 2255.

> "If a matter has been decided adversely to the defendant on direct appeal, it cannot be relitigated on collateral attack. Reconsideration is permitted, however, if there has been an intervening change in the law and the new law would have exonerated defendant had it been in force before his conviction was affirmed on the direct appeal." 3 C. Wright, Federal Practice and Procedure § 593, pp. 439-440 (2d ed. 1982).

Most states have similar rules for review within the state system. See, *e.g.*, *In re Harris*, 5 Cal. 4th 813, 829, 855 P. 2d 391, 395 (1993) (general rule of preclusion, with exceptions).

Should a rule of preclusion that applies within the judiciary of a single sovereign have any less force across jurisdictions? That is, should the federal judiciary give a judgment less preclusive effect merely because it comes from a state court? Generally,

> "[t]he answer is no. Absent a partial repeal of the Full Faith and Credit Act, 28 U. S. C. § 1738, by another federal statute, a federal court must give the judgment the same effect that it would have in the courts of the State in which it was rendered." *Matsushita Elec. Indus.* v. *Epstein*, 516 U. S. ___, 134 L. Ed. 2d 6, 14, 116 S. Ct. 873, 876 (1996).

At least since *Brown* v. *Allen*, 344 U. S. 443 (1953), the habeas corpus statute has been considered such a partial repeal. Congress has now adopted a unique rule for habeas corpus, with its own standard of preclusion and exceptions, rather than adopting the state's rules. This might be called the Nearly Full Faith and Credit Act.

C. Past Treatment of Prior Decisions on Habeas Corpus.

In the past, the treatment of prior decisions in habeas proceedings has run the entire spectrum. Originally, a prior denial of habeas was not res judicata, and each judge presented with a petition would review it *de novo*. *McCleskey* v. *Zant*, 499 U. S. 467, 479 (1991). However, a final criminal judgment *was* res judicata. "An imprisonment under a judgment cannot be unlawful, unless that judgment be a nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous." *Ex parte Watkins*, 3 Pet., at 203.

In the late nineteenth and early twentieth century, both of these rules softened. The availability of appeal from denial of habeas prompted more restraint in the consideration of successive petitions. See *McCleskey*, 499 U. S., at 479-481. During the same period, this Court expanded and finally dropped the pretense of limiting habeas to jurisdictional questions, see *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938); *Waley* v. *Johnston*, 316 U. S. 101, 104-105 (1942) (*per curiam*), and

reconsidered on federal habeas nonjurisdictional questions already decided in state court proceedings.

Prior to *Brown*, the same discretion that permitted denial of a successive petition also permitted denial of a federal petition raising a claim rejected in state court and denied certiorari by this Court. *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) stated that "a federal court will not ordinarily reexamine upon habeas corpus the questions thus adjudicated," citing *Salinger* v. *Loisel*, 265 U. S. 224 (1924), a successive petition case.

In recent years, the general rule has been that a prior federal adjudication, whether on appeal in federal criminal cases, a decision in this Court, or a prior federal collateral review, has preclusive effect with some exceptions. See *ante*, at 6 (federal criminal cases); 28 U. S. C. § 2244(c) (decision by Supreme Court); *id.*, at subd. (b) (successive federal petition); *McCleskey*, 499 U. S., at 490 (prior federal petition by state prisoner, "cause and prejudice" test for new claims). However, the prior state court ruling on questions of federal law or "mixed questions" of law and fact had no preclusive effect, and the issue would be relitigated *de novo*. See *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993).

This is the same standard that applies to decisions of lower courts when their judgments are reviewed on appeal by a higher court. See *ante*, at 5. Despite this Court's repeated statements through the centuries about the equal status of the state courts, they were being treated as inferiors. Cf. *Bollman*, 4 Cranch, at 97 ("state courts are not, in any sense of the word, inferior courts . . ."); *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884) (equal responsibility for enforcing constitutional rights); *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990) ("coequal parts of our national judicial system"). At long last, Congress has acted to correct this error.

D. Nature of the New Standard.

Since the underlying facts of the present case are not disputed, we need only consider the new standard as it applies to questions of law and mixed questions:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . ." 28 U. S. C. § 2254(d).

In floor debates in both houses, this was called a deferential standard by every member who spoke on the question, opponents as well as supporters. See 141 Cong. Rec. S7835, col. 2 (daily ed. June 7, 1995) (remarks of Sen. Lott, in favor); *id.*, at S7838, col. 3 (Sen. Cohen, opposed); *id.*, at S7841, col. 2 (Sen. Biden, opposed); *id.*, at S7847, col. 1 (Sen. Specter, in favor); *id.*, at S7848, col. 1 (Sen. Hatch, in favor); 142 Cong. Rec. H2182, cols. 1-2 (daily ed. Mar. 13, 1996) (Mr. Hyde, in favor); *id.*, at H2183, col. 1 (Mr. McCollum, in favor); 142 Cong. Rec. H2248, col. 1 (daily ed. Mar. 14, 1996) (Mrs. Chenoweth, opposed).

The majority opinion in the Seventh Circuit in this case seems to balk at the word "deference." See *Lindh* v. *Murphy*, 96 F. 3d 856, 868 (CA7 1996). Yet the opinion then goes on to hold that, at least in the context of the present case, "a 'reasonable' decision by the state court must be honored," *id.*, at 871, which is exactly what the proponents meant by "deference." See 141 Cong. Rec. S7848, col. 1 (remarks of Sen. Hatch). The substance is more important than the label.

In interpreting a statute, the text is, of course, paramount. "[A] committee of Congress cannot take language that could only cover 'flies' or 'mosquitos' and tell the courts that it really covers 'ducks.' " *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 611, n. 4 (1991). However, legislative history can be used, to the extent it does not contradict the text, "in a good-faith effort to discern legislative intent." *Id.*, at 612, n. 4.

The standard actually adopted by Congress has a fairly sparse legislative history, because it emerged rather late in the habeas debate. Earlier proposals typically sought to apply the "full and fair" standard of *Stone* v. *Powell*, 428 U. S. 465, 494-

495 (1976) across the board. See, *e.g.*, S. 8, §205, 103d Cong., 1st Sess. (1993). *Stone* makes "the correctness of the state court resolution . . . irrelevant." *Siripongs* v. *Calderon*, 35 F. 3d 1308, 1321 (CA9 1994). The standard adopted appears to have emerged for the first time in S. 635 in 1995.

The best legislative history we have for this provision lies in the Senate debate on two proposed amendments. Senator Kyl proposed language similar to the District of Columbia statute at issue in *Swain* v. *Pressley*, 430 U. S. 372 (1977). This amendment would have effectively eliminated federal habeas corpus as a postconviction review for state prisoners. See 141 Cong. Rec. S7829-7830. Senator Biden proposed to "strike[] the deference rule and allow[] the current practice of independent review," *i.e.*, *Brown* v. *Allen*. *Id.*, at S7841-7842. The Senate rejected both amendments, *id.*, at S7849-7850, thus adopting the current standard as a compromise. See *id.*, at S7847, col. 3 (remarks of Sen. Specter).

Senator Biden offered a clause-by-clause analysis of the deference standard, while arguing against it. *Id.*, at S7842. Disregarding the opinions expressed on the wisdom of the change and simply looking at his assessment of the structure of the subsection, that assessment is substantially correct. We will follow a similar path in our analysis.

1. The general rule: no relitigation.

The main body of 28 U. S. C. §2254(d) states, "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless . . . ." As Senator Biden explained, "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. S7842, col. 1.

Up to this point, Senator Biden is correct. He then goes on to state, "this is directly contrary to the purpose of habeas corpus . . . ." *Ibid.* In reality, this is simply a return to pre-*Brown* law. The normal procedure was then (and is again now) to refuse to "re-examine upon habeas corpus the questions thus

adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944); see *ante*, at 8. Relitigation is the exception.

2. "Clearly established."

The general rule against relitigation does not apply if the state proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States . . . ." 28 U. S. C. §2254(d)(1). Bypassing the first clause for now, we will first address the term "clearly established."

"[I]f a word is obviously transplanted from another legal source . . . it brings the old soil with it." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947). The term "clearly established" appears to be transplanted from the qualified immunity doctrine of the *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982) line of cases.

There are several reasons for believing that this term is transplanted from *Harlow*. First, the term "clearly established" is used as a term of art with a specific legal meaning only in those cases. A computer search for that term in Supreme Court opinions turns up only immunity cases and scattered generic uses of the term. Second, Senator Hatch referred specifically to *Harlow* in defending this standard. 141 Cong. Rec. S7848, col. 1. Third, preexisting case law had already connected habeas with the immunity cases.

Sawyer v. *Smith*, 497 U. S. 227, 236 (1990) concerned a claim that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) had been "dictated" by earlier precedent and hence was not a "new rule":

> "We do not doubt that our earlier Eighth Amendment cases lent general support to the conclusion reached in *Caldwell*. But neither this fact, nor petitioner's contention that state courts 'would have found *Caldwell* to be a predictable development in Eighth Amendment law,' Brief for Petitioner 8, suffices to show that *Caldwell* was not a new rule. In petitioner's view, *Caldwell* was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this

level of generality. Cf. *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987) ('[I]f the test of "clearly established law" were applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights')."

Thus even before the new Act, habeas and immunity shared common ground on the degree of specificity of the rule that state actors were alleged to have violated. *Anderson* defined "clearly established" this way:

> "The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citation], but it is to say that in light of pre-existing law the unlawfulness must have been apparent." 483 U. S., at 640.

For questions of pure law, as opposed to mixed questions, the requirement that unlawfulness be "apparent" is equivalent to the *Teague* requirement that the rule be "dictated" by precedent. Just as a law enforcement officer is immune if he reasonably could have believed his action was lawful, *id.*, at 641, so the state court judgment is "immune" from habeas if "reasonable jurists may disagree" at the time the state decision becomes final. *Sawyer*, 497 U. S., at 234.

The major change in the law comes in the case of mixed questions, which we will discuss further in part I C 4 below.

3. "As determined by the Supreme Court."

With this phrase, Congress has clarified a long-simmering problem. State courts are not obligated under the doctrine of *stare decisis* to follow the precedents of any federal court but the Supreme Court. *Lockhart* v. *Fretwell*, 506 U. S. 364, 376 (1993) (Thomas, J., concurring). Yet the lower federal courts have, until now, had the power to overturn state holdings based on those precedents. This is a most awkward situation for a state court which firmly believes circuit precedent to be wrongly

decided. See *People* v. *Santamaria*, 8 Cal. 4th 903, 923, 884 P. 2d 81, 92 (1994).

In one of the great ironies of the Congressional debate, Senator Biden sought to denounce this provision but actually illustrated its wisdom.

> "For example, an appeals court recently held that a defendant cannot be prosecuted criminally and have his property forfeited under the civil forfeiture laws because of the double jeopardy clause prohibiting that. That ruling is clear. It is unambiguous. But it is not a Supreme Court ruling. Under this bill, a State court, which subsequently refused to follow that interpretation, could not be corrected by habeas corpus review because it could never get back into the Federal court system." 141 Cong. Rec. S7842, col. 3 (daily ed. June 7, 1995).

This is clearly a reference to *United States* v. *$405,089.23*, 33 F. 3d 1210 (CA9 1994). Contrary to Senator Biden's statement, the "error" of a state court's refusal to follow this case does not require "correction" on habeas, because it is not error. See *United States* v. *Ursery*, 135 L. Ed. 2d 549, 558, 116 S. Ct. 2135, 2139 (1996) (reversing *$405,089.23*).

This Court has implicitly followed the same principle in its *Teague* cases. Absent a controlling Supreme Court precedent, "in the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts." *Caspari* v. *Bohlen*, 510 U. S. 383, 394-395 (1994). The rule Bohlen sought, but which Missouri courts rejected, would have been "new" despite a federal court of appeals precedent accepting it. The new Act makes explicit what was implicit under *Teague*. So long as the state courts follow the precedents they are obligated to follow, those of the Supreme Court, they are not violating established precedent.

4. "Contrary to or an unreasonable application of."

With the meaning of "clearly established" in mind, we return to the phrase "contrary to or an unreasonable application of." Courts must assume that Congress intended each branch of this disjunctive phrase to have meaning and for neither to be super-

fluous. See *Bailey* v. *United States*, 516 U. S. ___, 133 L. Ed. 2d 472, 481, 116 S. Ct. 501, 507 (1995).

In *Baylor* v. *Estelle*, 94 F. 3d 1321 (CA9 1996), the Ninth Circuit appears to have taken the view that the "contrary to" branch authorizes a grant of relief any time the federal habeas court disagrees with the state court's application of a preexisting Supreme Court precedent. Such an interpretation would render the "unreasonable application" branch a nullity, and indeed the *Baylor* court omits that phrase in paraphrasing the statute. *Id.*, at 1325. This cannot be correct. The "unreasonable application" branch was purposely included and vigorously debated. 141 Cong. Rec. S7842, cols. 1-2 (remarks of Sen. Biden); *id.*, at S7848, col. 1 (remarks of Sen. Hatch). It must have a meaning.

The most reasonable interpretation of this two-branch standard is that "contrary to" applies to the choice of the federal rule and "unreasonable application of" applies to the application of that rule to the particular facts, as the Court of Appeals held in this case. See *Lindh* v. *Murphy*, 96 F. 3d, at 870. Suppose, for example, a defendant claims ineffective assistance of counsel. If the state court, for whatever reason, ignores or overlooks *Strickland* v. *Washington*, 466 U. S. 668 (1984) and instead applies the long-discredited "farce or sham" standard, that would be "contrary to . . . clearly established Federal law." Cf. *Allen* v. *McCurry*, 449 U. S. 90, 101 (1980) (possible exception to preclusion in civil rights suit "where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim").

Far more common is the situation where the state court recognizes the correct standard and applies it to the facts, but the petitioner on habeas claims the application was wrong. This is where the "unreasonably applied" branch governs.

> "What does this mean? It means that if the State court reasonably applied Federal law, its decision must be upheld. Why is that a problematic standard? After all, Federal habeas review exists to correct *fundamental* defects in the law. If the State court has reasonably applied Federal law it is hard to say that a fundamental

> defect exists." 141 Cong. Rec. S7848, col. 1 (remarks of Sen. Hatch) (emphasis added).

Any time one court overturns the judgment of another court, it may be correcting error or it may be injecting error, overturning a correct judgment and substituting an erroneous one. See, *e.g.*, *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1027 (CA9 1988) (Arizona death penalty unconstitutional because judge, rather than jury, finds qualifying circumstances); *Walton* v. *Arizona*, 497 U. S. 639, 647-649 (1990) (that issue had been settled the other way years earlier); *Dunn* v. *Simmons*, 877 F. 2d 1275, 1278 (CA6 1989) (Kentucky procedure for adjudicating validity of prior conviction violates "federal standards"); *Parke* v. *Raley*, 506 U. S. 20, 28 (1992) (Kentucky rule "easily passes constitutional muster"); *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8 1985) (Arkansas death penalty law unconstitutional in part); *Perry* v. *Lockhart*, 871 F. 2d 1384, 1393 (CA8 1989) (*Collins* overruled as irreconcilable with later Supreme Court precedent).

The judgment of the court of last resort is "correct" by definition, see *Brown* v. *Allen*, 344 U. S., at 540 (opinion of Jackson, J.), but this Court cannot review every criminal case in the nation, or even a significant fraction of them. Hence some risk of error must be tolerated. There is no perfect solution to this dilemma. Congress has decided to let the state court decision stand in the "gray zones," while retaining a role for the federal courts to correct decisions outside the bounds of reasonable disagreement.

5. The co-equal state judiciary.

Whether this standard is called "deference" or something else is not important. What is important is that Congress has commanded a renewed respect for state courts and their judgments.

The new standard thus falls into the same class of rules as law of the case and the rule against reconsideration on a 2255 motion of issues settled on appeal. Like the rule on successive petitions, it is "a modified res judicata rule." Cf. *Felker* v. *Turpin*, 135 L. Ed. 2d 827, 840, 116 S. Ct. 2333, 2340 (1996). These are "middle ground" rules of preclusion which apply to

the decision of a *coordinate* court when the strict bar of res judicata is inapplicable.

The nature of the rule would be irrelevant if Congress had specified its application or nonapplication to pending cases, since none of the constitutional limits on retroactivity is applicable. In part II, we will show that Congress was silent on the question. In part III, we will show that under *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994) rules of this type apply to pending cases.

II. The statute is silent on the application of the Chapter 153 amendments to pending cases.

A. Silence and Negative Implication.

Public Law No. 104-132 made many changes to habeas corpus law. They can be classified in three groups. Sections 101 through 106 changed general habeas law in all cases. Section 107 added a special Chapter 154 to Title 28 U. S. C., applicable only to state (not federal) prisoners sentenced to death in states that meet certain requirements regarding appointments of counsel. See 28 U. S. C. § 2261(a).

Sections 108 and 903 amended 21 U. S. C. § 848(q), paragraphs (9) and (10) respectively. Paragraph (q)(4)(B) of that section provides appointment of counsel in federal collateral proceedings in *all* capital cases, both state and federal. Paragraphs (9) and (10) govern funding for expert and investigative services and compensation of counsel, respectively, and thus apply to all capital habeas and 2255 cases. See 1 Liebman & Hertz, *supra*, § 12.3b, at 380.

Congress expressly addressed the applicability to pending cases of the second group and part of the third. Section 107(c) of the Act makes new Chapter 154 applicable to pending cases. This provision has little practical effect, however, since the new chapter by its terms applies only when a state meets certain requirements, and no state's pre-Act appointment provisions have been found to qualify. See *Mata* v. *Johnson*, 99 F. 3d 1261, 1267 (CA5 1996) (Texas); *Bennett* v. *Angelone*, 92 F. 3d 1336, 1342 (CA4 1996) (Virginia); *Hill* v. *Butterworth*, 941 F. Supp. 1129, 1143-1144 (ND Fla. 1996); *Booth* v. *Maryland*,

940 F. Supp. 849, 855 (D Md. 1996); *Zuern* v. *Tate*, 938 F. Supp. 468, 472 (SD Ohio 1996); *Ashmus* v. *Calderon*, 935 F. Supp. 1048, 1074 (ND Cal. 1996); *Austin* v. *Bell*, 927 F. Supp. 1058, 1062 (MD Tenn. 1996). Section 107(c) does not mention any other provision of the Act.

As amended, 21 U. S. C. § 848(q)(10) caps attorneys' compensation per hour and sets a per-case cap on investigator and expert fees. Given the holding of *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696, 711 (1974), these caps would probably apply to services rendered after the date of enactment in pending cases, in the absence of statutory language to the contrary. However, Congress expressly provided in section 903(c) of the Act that these caps would apply only to cases or appellate proceedings commenced or perfected, respectively, on or after the date of the Act. The amendment to 21 U. S. C. § 848(q)(9) severely limits *ex parte* applications for funding, but the statute is silent on its application to pending cases.

It would be absurd to argue that the express limitation of amended § 848(q)(10) to new cases mandates the application of all other habeas-related provisions to all pending cases. Such a mandatory inference would require that completed *ex parte* orders be vacated under new § 848(q)(9) or that previously filed habeas petitions be dismissed under the new statute of limitations, 28 U. S. C. § 2244(d). Petitioner's negative implication argument is no stronger. When Congress specified the temporal reach of sections 107 and 903 of the Act, it was focussed on those sections. If it had meant to say anything about the temporal extent of sections 101 through 106 and 108, it would have.

There are any number of reasons why Congress did not specify whether the Chapter 153 amendments would apply to pending cases. The first possibility is that the optimum rule would be complex to draft. Some provisions should not apply to some pending cases. The new statute of limitation, 28 U. S. C. § 2244(d), should not oust a petition filed before the Act but more than a year after exhaustion of state remedies. The traditional rule is that the clock begins running upon enactment of the statute or accrual of the cause of action, whichever is later, when the statute does not specify otherwise. See *Sohn* v. *Waterson*, 17 Wall. 596, 600 (1873). A simple statement that

sections 101 to 106 in their entirety apply to all pending cases would raise doubts about the application of that sensible rule. Similarly, the new limits on evidentiary hearings, 28 U. S. C. § 2254(e)(2), should not vitiate the findings of hearings already held.

An attempt to pick through the sections one by one and specify which ones apply to which pending cases would raise new complexity and new bones of contention in an already complex and contentious bill. Congress as a whole may have felt that leaving the question to the courts applying the *Landgraf* approach would produce as good a result as Congress was likely to achieve, without opening this can of worms in the bill.

A second, and closely related, possibility is that Congress simply could not agree. See *Landgraf*, 511 U. S., at 263. Unlike *Landgraf*, there is no legislative history to this effect, but it remains a possibility.

The absence of any history on the point suggests a third possibility, that Congress simply did not consider the point. This possibility is not negated by the placement of section 107(c) in the bill by an anonymous drafter, when that section was never mentioned in the debate. The drafter of that provision may have foreseen that Chapter 154 would be less controversial than Chapter 153, and an express provision for application to pending cases could be inserted without controversy, while that was not true with Chapter 153.[3]

Petitioner insists that by specifying the application of Chapter 154 to pending cases and remaining silent on Chapter 153, Congress intended to convey the message that the latter only applied to cases *filed* after the passage of the Act. That would be "a surprisingly indirect route to convey an important and easily expressed message . . . ." *Landgraf*, 511 U. S., at 262.

First, that very argument had just recently been rejected in *Landgraf*, on a bill even more controversial than this one. *Id.*, at 262-263. If the members who favored limiting application to new cases had the votes to include such language expressly, they

3. Senator Biden, the principal opponent of section 2254(d), accepted Chapter 154 and included it in his own proposed amendment, "effective date" and all. 141 Cong. Rec. S7793 (daily ed. June 6, 1995).

would have been foolish to rely on an implication which so closely resembles the one rejected in *Landgraf*.

Second, nothing in *Landgraf* even remotely implies that the date of filing rather than the date of finality of the previous decision would be the controlling event. To the extent that sections 2244(b) and 2254(d) "attach[] new legal consequences to events completed before [their] enactment," *Landgraf*, 511 U. S., at 270, those "events" could only be the prior adjudications: the previous federal petition for section 2244(b) and the state proceedings for section 2254(d). Cf. *id.*, at 286 ("cases arising," not cases filed, before enactments). Yet this Court has already applied the new standards in a case where the earlier proceeding occurred prior to enactment of the Act. *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 838-839, 116 S. Ct. 2333, 2338-2339 (1996). Petitioner's theory that his "cause of action" had "matured" upon filing rather than some earlier event, Brief for Petitioner 40, deserves points for creativity, but the odds it ever occurred to Congress are nil.

B. Section 2264(b).

Petitioner asserts with vigor that "the sole function of [28 U. S. C. § 2264(b)] is to apply certain specified provisions found in the otherwise nonretroactive Chapter 153 to pending cases covered by Chapter 154." Brief for Petitioner 25. The history of Chapter 154 unequivocally refutes that contention.

Almost nine years ago, the Chief Justice appointed a committee chaired by retired Justice Lewis Powell to address the problems of capital habeas cases. Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 1 (1989) ("Powell Committee Report"). The Committee proposed redesignating the existing sections of Chapter 153 as Subchapter A, but otherwise leaving them unchanged, and adding a new Subchapter B. *Id.*, at 9. Chapter 154, as enacted, is substantially the Powell Committee's Subchapter B.

The Committee's proposed section 2259, *id.*, at 21-22, is the source of enacted section 2264. A side-by-side comparison is helpful, and both the proposed and enacted versions are reprinted in the Appendix.

Incorporation of otherwise inapplicable changes to section 2254 could not possibly have been the purpose of subdivision (b) as originally drafted, because it was part of a proposal that did not make any changes to that section. The original purpose of the section as a whole is set forth in the Committee's comments, which are also reprinted in the Appendix.

Petitioner considers it "outlandish" that section 2264 was intended to replace the exhaustion rule of section 2254(b), Brief for Petitioner 26, but that was precisely the drafters' intent. See *post*, at A-2. While the state does have an interest in the exhaustion rule, it also has an interest in prompt resolution of capital cases, and "*Lundy* ping-pong" severely interferes with that interest.

In a typical capital case, the defendant presents numerous claims to the state court and is denied. Then he wants to present those claims plus some more to the federal court. At present, the defendant must return to state court to present those claims, only to be told, in the typical case, that they are defaulted. See, *e.g.*, *Morales* v. *Calderon*, 85 F. 3d 1387, 1388-1389 (CA9 1996), cert. denied *sub nom. Calderon* v. *Morales*, No. 96-355 (Nov. 18, 1996).[4] The federal court must then wade hip-deep into state law to decide whether the default rule is "adequate," see *id.*, at 1392, a murky area of the law with only cryptic guidance from this Court. See *Dugger* v. *Adams*, 489 U. S. 401, 410-412, n. 6 (1989) (relegating the entire issue to a footnote). If the state bar is adequate, the federal court must apply the "cause and prejudice" rules. See *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986).

For capital cases in "opt-in" states, section 2264 sweeps away this complexity. In effect, it declares all claims not presented to the state courts on appeal or the first habeas to be defaulted, and it permits their consideration only for three specific kinds of "cause." Paragraph (a)(1) is the quintessential "cause," concealment by the government. See *Amadeo* v. *Zant*,

4. Justice O'Connor noted the potential problem in *Harris* v. *Reed*, 489 U. S. 255, 269-270 (1989) (concurring opinion). Unfortunately, the procedural default rules, state and federal, have not been sufficiently clear to prevent it.

486 U. S. 214, 222 (1988). Paragraph (a)(2) is *Reed* v. *Ross*, 468 U. S. 1, 16 (1984), but *Reed*-qualified rules are necessarily *Teague*-barred unless they qualify for a *Teague* exception. *Selvage* v. *Collins*, 975 F. 2d 131, 136 (CA5 1992); *Gacy* v. *Welborn*, 994 F. 2d 305, 310-311 (CA7 1993). This Court has yet to find a new rule that qualifies. Paragraph (a)(3) is *McCleskey* v. *Zant*, 499 U. S. 467, 498 (1991) ("reasonable and diligent investigation").

Congress did not adopt the Powell Committee draft intact. First, it eliminated the evidentiary hearing language, since section 2254(e) prescribes rules for evidentiary hearings. Second, it made more explicit the preclusion of new claims which do not qualify for the exceptions. Third, it deleted the phrase "on the merits" after "rule," to preclude any inference that *Teague* would not apply. See *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994) (*Teague* is "threshold question in every habeas case"); *ibid.* ("before considering the merits").

Finally, Congress included references to the limitations in section 2254, subdivisions (a), (d), and (e) to reaffirm that these limits apply, even though (b) and (c) do not. The reference to unchanged subdivision (a) of section 2254 negates petitioner's thesis that the purpose of this cross-reference has anything to do with application of the amendments to pending cases. Section 2264, subdivision (b) was drafted as a permanent statement of the law, not as a mere transition provision.

In short, Congress has not made an "unambiguous directive," *Landgraf*, 511 U. S., at 263, regarding the application of the Chapter 153 amendments to pending cases. It has not even made an ambiguous directive. It has not made any directive at all. As in *Landgraf*, the Court must "look elsewhere" for the answer. *Ibid.* The "elsewhere" is the default rules set forth in *Landgraf*.

III. Section 2254(d) is a procedural change, and its application to pending cases is not "retroactive effect" within the meaning of *Landgraf*.

A. The Specialized Meaning of "Retroactive."

Under *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), the question of whether a new law applies to pending cases is not the same as the question of whether it is "retroactive." In order "to reconcile two seemingly contradictory statements," *id.*, at 263-264, *Landgraf* gave a specialized meaning to the terms "retroactive" and "retrospective." The opinion repeatedly puts these terms in quotes to indicate that they have a specialized meaning. See *id.*, at 268, 269, 270, 277, 279.

"Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.*, at 275. Such application is simply not "retroactive" within *Landgraf*'s specialized meaning. Thus, a presumption that a statute will not be applied retroactively does not mean it is presumed to apply only to cases arising after its enactment or filed after its enactment. This presumption is the beginning, not the end, "of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.*, at 270. It is true that Congress must speak clearly "if it wishes to make new legislation retroactive *in the Landgraf sense*." See Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* 14 (emphasis added). But no one is contending to the contrary. The question is whether application to this case would be "retroactive" *in that sense*.

One obvious fallacy can be dismissed at the threshold. Despite *Landgraf's* admonition that determining retroactivity is "not always a simple or mechanical task," 511 U. S., at 268, *Boria* v. *Keane*, 90 F. 3d 36, 37 (CA2 1996) declared that if "the new statute would require a different outcome, application of the new statute . . . would be retroactive." That proposition cannot be reconciled with either the prospective relief cases or the jurisdictional cases. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 201 (1921), the new

statute changed the outcome by forbidding certain previously allowed injunctions, yet it applied to pending cases. In *Bruner* v. *United States*, 343 U. S. 112, 117 (1952), the new statute resulted in the dismissal of Bruner's cause of action. While another forum had been available in the Court of Claims, *id.*, at 115, it would appear that in 1952 the statute of limitations had run on a claim for services during World War II. See *id.*, at 113; 28 U. S. C. § 2401; see also *Landgraf*, 511 U. S., at 293 (Scalia, J., concurring in the judgment). Nothing in the Court's opinion indicates it considered whether Bruner still could file in the Court of Claims or that its decision would be different if he could not. *Landgraf* reaffirms both *American Steel Foundries* and *Bruner*, 511 U. S., at 273-274. The outcome determinative effect of the statute does not determine the outcome of the *Landgraf* analysis.

Landgraf sought to relieve "apparent tension" between statements in prior opinions, *id.*, at 264, but some of the statements in *Landgraf* introduce new tension. *Landgraf* says "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.*, at 269-270. Yet a footnote to the sentence before this one quotes with approval a statement that "a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.' " *Id.*, at 270, n. 24. If a rule of law "draws upon antecedent facts" to produce its result, it would seem to necessarily "attach[] new legal consequences" to those facts.

"New legal consequences" cannot, therefore, be applied as a simplistic test. Instead, "the nature and extent of the change in the law," *id.*, at 270, must be considered. If the change wrought by this law is of similar nature and comparable or lesser extent when compared to other laws that have applied to pending cases, then this law should apply to this case.

B. Procedural Changes and Secondary Conduct.

Changes in procedural rules are generally not "retroactive" when applied to pending cases. *Landgraf*, 511 U. S., at 275. This is so because they "regulate secondary rather than primary conduct." *Ibid.* "Primary conduct" is the conduct of people in the ordinary course of life. In *Landgraf*, it was "the discriminatory conduct of respondents' agent . . . ." *Id.*, at 283. In the

present case, it is Aaron Lindh entering the City-County Building with a gun and shooting people.

"Secondary conduct" is the conduct of adjudication. In *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969), the primary conduct was the conduct of the parties in making a lease and carrying out or defaulting their obligations under the lease. The "secondary conduct" was the eviction proceeding, which was governed by a new regulation. See *Landgraf*, 511 U. S., at 276 (noting *Thorpe* "shares much" with "procedural" cases).

In the present case, the "secondary conduct" was Lindh's trial. Proceedings to review that trial are at least "secondary" within the meaning of *Landgraf*. Habeas corpus is so far removed it might even be called "tertiary conduct."

This tertiary status can be seen in this Court's application to pending cases of rules governing the habeas corpus process itself. While "new rules" governing trial are no longer applied to overturn final judgments, with very narrow exceptions, *Teague* v. *Lane*, 489 U. S. 288, 300 (1989), new rules governing habeas are routinely applied, regardless of which way they fall.

On the same day the Court decided *Teague* it established the "plain statement" rule in favor of defendants on procedural default questions. *Harris* v. *Reed*, 489 U. S. 255, 265 (1989). That rule had previously applied only on certiorari, *Michigan* v. *Long*, 463 U. S. 1032, 1042 (1983), which is typically a very remote possibility. Hence, state courts and prosecutors had little reason to make or request such statements. Even so, the *Harris* rule applied to pending cases, making claims eligible for consideration on habeas that would otherwise have been barred. See *Harris*, 489 U. S., at 285 (Kennedy, J., dissenting) (noting some claims clearly barred under state law will now be eligible).

Although this upset expectations, it was consistent with the principle of application of new procedural rules. Cf. *Landgraf*, 511 U. S., at 275. Similarly, other changes in habeas procedure, including *Teague* itself and *McCleskey* v. *Zant*, 499 U. S. 467 (1991), have applied to pending cases.

In discussing the "procedural" cases, *Landgraf* relied on the substantive/procedural distinction in the criminal *ex post facto*

cases, 511 U. S., at 275, n. 28, including *Collins* v. *Youngblood*, 497 U. S. 37 (1990). *Youngblood* defines procedural changes as "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.*, at 45.

The statutory change in *Youngblood*, like that in the present case, governed neither the definition of a crime, the punishment for a crime, nor even the procedure for trying a crime. It governed remedies upon review of a criminal case. *Id.*, at 39-40. This was obviously procedural. *Id.*, at 44.

A closely analogous situation arose in 1919 when Congress enacted the "harmless error" statute, the predecessor of 28 U. S. C. §2111.[5] Some defendants whose convictions would have been reversed instead had them affirmed. Yet the statute was applied to pending cases without hesitation. See *Horning* v. *District of Columbia*, 254 U. S. 135, 139 (1920)[6]; see also *Camp* v. *Gress*, 250 U. S. 308, 318 (1919) (civil case).

In enacting this statute, Congress decided that certain errors previously thought to be sufficient to overturn a conviction on appeal would no longer have that effect. In the present Act, Congress has made that same determination with regard to collateral attack. The two changes are similar in nature. They are also comparable in extent because, even though the present Act reaches more serious errors, it does not cut off the only remedy. It reaches only claims already adjudicated on appeal or state habeas.

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5. The history of this statute is described in *Kotteakos* v. *United States*, 328 U. S. 750, 757-759 (1946).

6. Justice Brandeis disagreed with the majority's harmless error determination, 254 U. S., at 140 (dissenting opinion), and his position was ultimately vindicated. See *United States* v. *Gaudin*, 515 U. S. ___, 132 L. Ed. 2d 444, 456, 115 S. Ct. 2310, 2318 (1995). Yet he expressed no doubt that the statute applied to pending cases.

C. Jurisdictional Changes.

The "jurisdictional" cases involve changes similar in nature but *greater* in extent than the present case, yet these changes have uniformly applied to pending cases in the absence of contrary direction from Congress. *Landgraf*, 511 U. S., at 274. The essence of the present Act is that habeas petitioners no longer receive *de novo* review in federal court. Yet Congress could have simply repealed 28 U. S. C. §§ 2241(c)(3) and 2254, eliminating *any* federal court review and returning to antebellum law. Under this Court's precedents there is no question that this more drastic change would have applied to pending cases.

Hallowell v. *Commons*, 239 U. S. 506 (1916) involved the inheritance of property held by the United States in trust for an Indian who had died. Congress repealed the federal court's jurisdiction, thereby rendering the Secretary of the Interior's decision final with no judicial review at all. *Id.*, at 508. This act applied to pending cases. It "takes away no *substantive* right, but simply changes the tribunal that is to hear the case." *Ibid.* (emphasis added, quoted with approval in *Landgraf*, 511 U. S., at 274). Hallowell may very well have had a "matured cause of action" for the inheritance, but his action was nonetheless dismissed.

In *Sherman* v. *Grinnell*, 123 U. S. 679 (1887), a party was denied a federal forum by a statute making remand orders unreviewable. That act applied to require dismissal of an appeal from a remand order issued before enactment of the statute. *Id.*, at 680. Sherman had to make his case in state court. Similarly, in *The Assessor* v. *Osborne*, 9 Wall. 567 (1870), Osborne had a substantive right to recover overpaid taxes and a procedural right to litigate that claim in federal court. Congress abolished the latter ten days after he filed. *Id.*, at 569, 573. The statute applied to his case, and he had to go to state court. *Id.*, at 573-574.

Petitioner may argue that the jurisdiction cases are inapposite because the present Act is not jurisdictional.[7] The premise is debatable. The Act lies somewhere between the rule of *Teague*

7. More precisely, the argument in petitioner's overlong typed brief at page 56, but deleted from the printed version, may reappear in his reply.

v. *Lane*, 489 U. S. 288 (1989), which is not jurisdictional, *Youngblood*, 497 U. S., at 41, and the Tax Injunction Act, 28 U. S. C. § 1341,[8] which is. *California* v. *Grace Brethren Church*, 457 U. S. 393, 396 (1982). But even accepting the premise *arguendo*, the conclusion does not follow. The present Act shares the key characteristic that makes jurisdictional statutes apply to pending cases. It changes whose decision will control, rather than the underlying rule.

The substance of the underlying claim is the procedure of trial. The controlling rule is the Confrontation Clause, U. S. Const., Amdt. 6, and its case law corollaries, *Davis* v. *Alaska*, 415 U. S. 308 (1974) and *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986). Congress could not change this rule, and it has not attempted to do so. Congress can and has altered the relations of the two sets of courts which consider this question *seriatim*.

Congress has decided that, for debatable questions, the decision of the state courts will be final. In *Hallowell*, Congress had decided that the Secretary's decision of all questions, debatable or not, would be final. In *Sherman* and *Osborne*, cases went to state court for decision that would or might have remained in federal court. All of these changes are similar in nature but greater or equal in extent to the case at issue in this case. Yet all applied to pending cases.

D. Prospective Relief.

"Unlike certain other forms of relief, compensatory damages are quintessentially backward looking." *Landgraf*, 511 U. S., at 282. Habeas corpus is one of those "certain other forms." It is quintessentially forward looking.

Originally, habeas corpus was only for custody that is presently illegal. *McNally* v. *Hill*, 293 U. S. 131, 138 (1934). Later, this Court extended it, for largely practical reasons, to custody that was presently legal but would become illegal in the future. *Peyton* v. *Rowe*, 391 U. S. 54, 62, 63 (1968). Finally, the "collateral effects" of a conviction such as future inability to

8. That Act forbids federal adjudication, conditioned upon the availability of state remedies. It is therefore similar in function to the rule of *Stone* v. *Powell*, 428 U. S. 465, 494 (1976).

engage in certain businesses or to vote in the future were held sufficient to prevent mootness when the petition is filed during the challenged custody but petitioner is released while the case is pending. *Carafas* v. *LaVallee*, 391 U. S. 234 (1968).

However, in the absence of substantial present or future consequences of the challenged aspect of the judgment, there is no relief that a habeas corpus court can give. Thus, when a defendant attacks the sentence and not the conviction and the sentence has expired, the case must be dismissed as moot. *Lane* v. *Williams*, 455 U. S. 624, 631 (1982).

Habeas is thus like an injunction and unlike damages. Cf. *Ellis* v. *Railway Clerks*, 466 U. S. 435, 441-442 (1984) (injunction claim moot, damages claim remains). Habeas does not compensate the prisoner for past incarceration, and it does not punish the state for imposing it. It only prevents any further illegal custody. This relief is precisely analogous to the injunction against labor picketing in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921). See *Landgraf*, 511 U. S., at 273-274.

The history of the case has always been a factor in deciding whether relief will be granted. Even before the latest amendments, the statute gave preclusive effect, with some exceptions, to prior state court determinations of fact, see 28 U. S. C. § 2254, former subdivision (d) (1988 ed.), and prior federal court resolution of claims. See 28 U. S. C. § 2244, former subdivision (b) (1988 ed.). By adding state court resolution of questions of law and mixed questions to this list, Congress has taken a step similar in nature but lesser in extent to the one at issue in *American Steel Foundries*. Rather than forbidding prospective relief altogether, it has limited the class of cases in which that relief is proper. The relief remains prospective, and the rule on the application of the new statutes to prospective relief applies. For the same reason, the present case would be decided the same way if the Court were to adopt Justice Scalia's approach. See *Landgraf*, 511 U. S., at 293 (opinion concurring in the judgment).

Application of new section 2254(d) to this case has none of the evils of "retroactivity" that underlie *Landgraf*. The Act does not increase any penalty or liability for past actions. Cf. 511

U. S. at 281-282. It does not deprive anyone of property. Cf. *id.*, at 271. It does not require a person to comply with a new requirement after it is too late to do so. Cf. *ibid*. It does not require that completed actions be redone. Cf. *id.*, at 275, n. 29. It only narrows the category of cases in which persons who have already had their day in court will get another. The reasons underlying the application of procedural, jurisdictional, and prospective relief rules to pending cases fully apply to this case.

IV. The present case illustrates the wisdom of the new statute.

Time and time again, this Court has warned against misuse of the Constitution to micromanage state trials. *Harris* v. *Alabama*, 513 U. S. ___, 130 L. Ed. 2d 1004, 1014, 115 S. Ct. 1031, 1036 (1995); *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967); *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Yet the admonition is ignored more than it is heeded.

The rules of evidence, both state and federal, assign to the discretion of the trial judge the task of weighing the probative value of evidence against the danger of unfair prejudice. Fed. Rules Evid. 403; Wis. Stat. § 904.03; *United States* v. *Abel*, 469 U. S. 45, 54 (1984) (unanimous); *State* v. *Lindh*, 468 N. W. 2d 168, 176 (Wis. 1991). If this quintessentially evidentiary question is constitutionalized, however, and if all constitutional questions are reviewed *de novo* on habeas, then the trial judge's decision will not only be second-guessed and third-guessed on appeal, but also fourth-guessed and fifth-guessed in the federal district court and court of appeals.

Such extreme review and re-review may well be appropriate for truly fundamental questions, but fundamental rules are now only a small subset of constitutional rules, and they have been for many years. The fact that a rule is constitutional no longer suffices to compel *de novo* review on habeas. See *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 156-157 (1970).

The danger of prejudice in this case was great. If mere allegations of misconduct by a prosecution expert are deemed *per*

se admissible, it will be "open season" for character assassination on them. Such allegations are all too easy to make, and they damage a professional's career even where they are ultimately found to be baseless. Given the preliminary status of the allegations, the steps taken by the Dane County District Attorney to neutralize the conflict, and the unique and irreplaceable position of Dr. Roberts as the only psychiatrist to have interviewed Lindh near the time of the crime, the trial judge's decision seems well within the bounds of discretion. Yet the dissenting judges in the Court of Appeals would decide this question yet again, as the *fifth* court in which it has been argued.

Constitutional or not, this is not the kind of fundamental question that warrants such extended review. Congress has now forbidden it. For this case and for the entire enormous backlog of capital cases, these borderline claims on the ragged edge of constitutional law should simply be denied. Petitioner has already had his day in court. He is not entitled to another.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

March, 1997

Respectfully submitted,

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APPENDIX A

Powell Committee § 2259:	Enacted § 2264:
"(a) Whenever a state prisoner under a capital sentence files a petition for habeas corpus relief to which this subchapter applies, the district court shall:	"(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
"(1) determine the sufficiency of the evidentiary record for habeas corpus review based on the claims actually presented and litigated in the state courts except when the prisoner can show that the failure to raise or develop a claim in the state courts is (A) the result of state action in violation of the Constitution or laws of the Un[it]ed States; (B) the result of the Supreme Court recognition of a new federal right that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state post-conviction review; and	"(1) the result of State action in violation of the Constitution or laws of the United States;
"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.	"(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it."	"(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.
	"(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it."

Powell Committee Comment to Proposed § 2259

"**COMMENT:** Subsection (a) defines the scope of federal review in capital cases to which this subchapter applies. It authorizes the district court to consider only those federal claims actually raised and litigated in the state courts. If the section 2254 petition presents no new claims, the district court will proceed to rule on the merits of the claims properly before it as long as the state evidentiary record and findings of facts are adequate. If they are deficient in any respect recognized under section 2254(d), the district court must complete the evidentiary record before addressing the issues on the merits. To this extent, subsection (a) does not depart from existing law and practice.

"If a petitioner asserts a claim not previously presented to the state courts, the district court can consider the claim only if one of the three exceptions to the general rule listed in subsection (a)(1) is applicable. In that case, the district court must conduct an evidentiary hearing necessary to a full and fair consideration of the claim and in accordance with subsection (b) adjudicate it on the merits only with all other issues presented in the section 2254 petition.

"As far as new or 'unexhausted' claims are concerned, section 2259 represents a change in the exhaustion doctrine as articulated in *Rose* v. *Lundy*, 455 U. S. 509 (1982). Section 2259 bars such claims from consideration unless one of the subsection (a)(1) exceptions is applicable. The prisoner cannot return to state court to exhaust even if he would like to do so. On the other hand, if a subsection (a)(1) exception is applicable, the district court is directed to conduct an evidentiary hearing and to rule on the new claim without first exhausting state remedies as *Rose* v. *Lundy* now requires. Because of the existence of state procedural default rules, exhaustion is futile in the great majority of cases. It serves the state interest of comity in theory, but in practice it results in delay and undermines the state interest in the finality of its criminal convictions. The Committee believes that the States would prefer to see postconviction litigation go forward in capital cases, even if that entails a minor subordination of their interest in comity as it is expressed in the exhaustion doctrine." *Id.*, at 22-23.

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NO. 96-6298

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH, ***Petitioner,***

v.

JAMES P. MURPHY, ***Respondent***

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND PETITION FOR WRIT OF HABEAS CORPUS

BRIEF FOR *AMICI CURIAE* STATES OF OHIO, WASHINGTON, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY,LOUISIANA, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WYOMING AND THE TERRITORIES OF GUAM AND THE VIRGIN ISLANDS IN SUPPORT OF RESPONDENT

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NO. 96-6298
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

AARON LINDH, *Petitioner,*

v.

JAMES P. MURPHY, *Respondent*

STATEMENT OF *AMICI* INTEREST

The States of Washington and Ohio, together with forty other States and Territories, join in supporting respondent as *amici curiae* and in urging the Court to affirm the decision of the United States Court of Appeals for the Seventh Circuit.

The *amici* States, particularly the offices of their attorneys general, have first-hand experience with federal habeas claims and with the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"). The States' attorneys general are chiefly responsible for defending federal habeas claims, they were active proponents of the Act, and they are vitally interested in seeing the provisions of the Act applied to pending cases. Nor does the States' interest in this case stem solely from their desire to uphold State-court criminal convictions. They also wish to respect the interests of victims in defending these convictions.

The application of the Act to pending cases concerns the States for a final reason. Until recently, many of the statutory and judicial changes to federal habeas law expanded, rather than contracted, the tools available to State prisoners to overturn their State-court convictions. At every

turn, the courts applied these changes to pending habeas cases. That was appropriate under this Court's retroactivity case law. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 114 S. Ct. 483 (1994). It is no less appropriate, not to mention even-handed, to apply changes that contract the jurisdiction of federal courts to pending habeas cases seeking to upset State criminal convictions. For these reasons and those elaborated below, the *amici* States join their sister State, Wisconsin, in asking the Court to affirm the decision below.

SUMMARY OF ARGUMENT

The Act does not have retroactive effect. It does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 114 S. Ct. at 1505.

In examining whether the Act has retroactive effect, it is appropriate initially to place the inquiry in context -- to look at prior changes to federal habeas law and the application of these changes to already-completed State-court criminal convictions. Early federal laws created only modest power to release individuals held in State custody. Beginning in 1789, a federal court could issue the writ to produce a State prisoner whose testimony was needed. By 1833, a federal court could issue the writ if a State prisoner was committed for adhering to a requirement under federal law. And by 1842, a federal court could issue the writ if a State prisoner was a citizen of a foreign State.

Soon after the Civil War, Congress significantly expanded these limited forms of relief by enacting the Habeas Corpus Act of 1867. Comparable in scope to the then-existing authority of federal prisoners to challenge their

detention, the Act thus did not allow State prisoners to challenge detentions compelled by a court of competent jurisdiction. Decisions of this Court, however, eventually gave a broader construction to the scope of the writ. Eventually the Court allowed State prisoners to challenge the adequacy of the State judicial process, which came to include the authority to relitigate *de novo* the substance of legal claims fully litigated in State court, to reexamine facts found in State criminal trials, and to address legal claims that prisoners had failed to raise in accordance with State procedural rules.

Additional statutory changes to federal habeas law occurred during the last half century. In 1948, Congress established an exhaustion requirement. In 1966, Congress limited review of State-court evidentiary proceedings. And in 1996, Congress limited the jurisdiction of federal courts to overturn State-court convictions premised on reasonable determinations of law and fact.

At every turn, including most recently in the 1996 Act, *see Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996), the courts have applied these changes to the scope of federal habeas review to pending cases and to previously-completed State-court convictions. Indeed, the State *amici* do not know of a single instance in which the federal courts did not apply such changes to pending cases (save when Congress expressly directed the courts not to do so). It is both appropriate and fair to continue to adhere to this even-handed tradition: Thus, whether the change in law expands habeas jurisdiction (which helps State prisoners) or limits federal habeas jurisdiction (which helps the States), the modification ought to apply to pending cases unless Congress has clearly said otherwise.

Not surprisingly, in view of this historical practice, *Landgraf* also supports application of the Act to pending cases. The Act simply does not have an impermissible retroactive effect in this setting. First, where Congress acts to restrict the jurisdiction of federal courts, as it did here, the new law governs pending cases "because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 114 S. Ct. at 1502 (internal quotation omitted). Second, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf*, 114 S. Ct. at 1501. Equitable and injunctive in nature, habeas relief is plainly a form of prospective relief, even when it applies to conduct that occurred before a statute's passage. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). Third, legislation does not have retroactive effect within the meaning of *Landgraf* when it regulates secondary conduct (the process of seeking collateral relief from a criminal conviction), as opposed to primary behavior (the process of determining whether someone has violated a States' criminal laws). *See Landgraf*, 114 S. Ct. at 1502, 1505. Nor, for these reasons, can petitioner tenably claim that the Act increases liability for his prior criminal conduct, imposes new duties on him with respect to the underlying criminal actions, or impairs any rights he possessed at the time he committed the crime.

ARGUMENT

Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal habeas petitioner may not obtain relief from a State-court conviction "unless the adjudication of the claim"

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. Section 2254(d). The amendment thus deprives district courts of their previously-held jurisdiction to conduct *de novo* review of the facts and law underlying State-court criminal convictions. Even though this change does not regulate the underlying conduct that caused petitioner to be incarcerated in the first place, he contends that the change should not apply to cases pending prior to the date of enactment because it would upset settled expectations relating to the scope of habeas review and attach new legal consequences to his pre-Act conduct. When measured against the historical practice in this area as well as the teachings of *Landgraf*, this claim does not withstand close scrutiny. The decision below should be affirmed.

A. THE COURTS TRADITIONALLY HAVE APPLIED CHANGES TO THEIR JURISDICTION OVER STATE-PRISONER HABEAS CORPUS CLAIMS TO PENDING CASES.

At the outset the right to make a collateral attack on a State-court criminal conviction under federal law did not exist at all. Neither the United States Constitution nor Congress gave the federal courts such power as an original matter. Nor has the Constitution done so since, or for that matter even required State courts to guarantee criminal

appeals, *see Goeke v. Branch*, __ U.S. __, 115 S. Ct. 1275, 1278 (1995); *McKane v. Durston*, 153 U.S. 684 (1894). The authority to establish habeas review of State-court convictions and determine its parameters has long rested with Congress. *Felker v. Turpin*, 116 S. Ct. 2333 (1996).

1. The Right Collaterally To Attack State-Court Criminal Convictions Has Changed Dramatically During The Last 200 Years.

Early on Congress created the barest of federal habeas corpus remedies to release individuals held in State custody. Beginning in 1789, with passage of the First Judiciary Act, a federal court could issue the writ to produce a State prisoner if it was "necessary to be brought into court to testify." Act of Sept. 24, 1789, ch. 20, Section 14, 1 Stat. 82. By 1833, State prisoners could obtain the writ if they were "committed for any act done in pursuance of a law of the United States." Act of March 2, 1833, ch. 57, Section 7, 4 Stat. 634-35. And by 1842, State prisoners could be released if they were a "subject or citizen of a foreign State, and domiciled therein," and held under State law. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539-540.

Soon after the Civil War, Congress expanded these limited forms of relief by enacting the Habeas Corpus Act of 1867. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Similar in scope to the then-existing authority of federal prisoners to challenge their detention, the Act thus was not available to challenge detentions resulting from a judgment issued by a court of competent jurisdiction. *See* First Judiciary Act, 1 Stat. 81-82 (authorizing federal prisoners to challenge their detention); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830) ("An imprisonment under a judgment cannot be

unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."); *Kuhlman v. Wilson*, 477 U.S. 436, 445-46 (1986) (plurality opinion) ("Until the early years of this century, the substantive scope of the federal habeas corpus statutes was defined by reference to the scope of the writ at common law."); *Fay v. Noia*, 372 U.S. 391, 452-54 (1963) (Harlan, J., dissenting).

Over time decisions of this Court gave a broader construction to the scope of the statutory writ. Eventually the Court allowed State prisoners to challenge the adequacy of the judicial process. *See Frank v. Mangum*, 237 U.S. 309 (1915); *Moore v. Dempsey*, 261 U.S. 86 (1923). This came to include (1) the authority to relitigate *de novo* the substance of the legal claims litigated in State court, *Brown v. Allen*, 344 U.S. 443 (1953), (2) the authority to reexamine facts found in State criminal trials, *Townsend v. Sain*, 372 U.S. 293 (1963), and (3) the authority to address legal claims that prisoners had failed to raise in accordance with State procedural rules, *Fay v. Noia*, *supra*.

Since 1963, several decisions of the Court have narrowed the federal courts' scope of review to alter State-court criminal convictions. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465, 482 (1976) (limiting habeas corpus review of Fourth Amendment claims); *Sumner v. Mata*, 449 U.S. 539, 549-51 (1981) (applying a presumption of correctness to State-court findings of fact); *Wainwright v. Sykes*, 433 U.S. 72, 87-91 (1977) (applying the procedural default doctrine to State-court habeas claims); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (precluding the application of new constitutional rules of criminal procedure to State-court habeas claims); *McCleskey v. Zant*, 499 U.S. 467 (1991) (applying abuse of writ doctrine); *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (applying harmless error rule to State-court habeas claims).

At the same time, Congress itself has statutorily altered the scope of the writ during the last 50 years. In 1948, Congress codified an exhaustion requirement for federal habeas claims. 28 U.S.C. Section 2254, Ch. 646, 62 Stat. 964 (1948). In 1966, Congress limited review of State-court evidentiary proceedings. 28 U.S.C. Sections 2241, *et seq.*, Pub. L. No. 89-590, 80 Stat. 811 (1966); Pub. L. No. 89-711, 80 Stat. 1105 (1966). And, just last year, Congress enacted the Antiterrorism and Effective Death Penalty Act.

2. Congress And The Courts Have Customarily Applied Changes In Federal Habeas Jurisdiction To Pending Cases, Whether Those Changes Expanded Or Contracted The Scope Of The Writ.

At every turn in the evolution of federal habeas corpus review, to the State *amici's* knowledge, the courts have applied these changes to pending cases. The eighteenth and nineteenth century statutory expansions of the writ, from all appearances, applied to pending cases. Nothing in the case law, or the language of the acts themselves, suggests that they were not effective upon announcement. As a result, each of these changes created an immediate new remedy to obtain release from a State-court conviction.

The experience in the twentieth century has been no different. Both the 1948 and 1966 statutory amendments to the writ were applied to pending cases. *See Gusik v. Schilder*, 340 U.S. 128, 131-133 & n.4 (1950) (applying the 1948 amendment to pending claims); *Smith v. Yeager*, 393 U.S. 122, 124-125 (1968) (applying the 1966 amendment to pending claims); *Carafas v. LaVallee*, 391 U.S. 234, 239

(1968) (same). Even the 1996 Act has already been applied to pending claims, at least with respect to other portions of the Act. *See Felker v. Turpin*, 116 S. Ct. 2333 (1996).

The same has occurred with respect to new interpretations of habeas law by the courts. Even though different factors govern the application of new decisions to pending cases, *see Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), statutory *and* judicial changes have been applied to pending cases. *See, e.g., Stone v. Powell*, 428 U.S. at 495 n.38 (rejecting petitioner's contention that any change should be applied prospectively); *Wainwright v. Sykes*, 433 U.S. 72, 87-91 (applying the cause and prejudice doctrine to pending case); *Sumner v. Mata*, 449 U.S. 539, 549-51 (applying presumption of correctness of State court findings of fact to pending case); *Brown v. Allen*, 344 U.S. 443 (1953) (applying interpretation to pending case). The *amici* States are not aware of a single decision, regardless of whether it narrowed or expanded the scope of the writ, that did not apply to pending cases.

Against this historical backdrop, petitioner's claim (Br. 48) that fairness and individual expectations prevent application of the Act to pending cases rings hollow. In light of the unbroken tradition of applying changes to pending cases, petitioner's expectation has no basis in fact. Unless Congress speaks clearly to the contrary, all changes have been applied to pending cases. And no doubt, when Congress chooses to do so, it knows how to indicate that a change does not affect pending cases. *See* Act Section 211 (making changes in restitution law and procedures applicable only to "sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment"); Section 235(h) (provisions concerning closed circuit television of court proceedings apply only to cases filed after January 1, 1995); Section 435 (provision expanding criteria

for deporting aliens convicted of crimes of moral turpitude applicable to those "against whom deportation proceedings are initiated after the date of enactment"); Section 441 (amendment limiting collateral attacks on deportation orders applicable only where criminal proceedings initiated after the date of enactment); Section 903 (making changes in the rate of compensation of appointed counsel in certain capital cases apply only to cases commenced or appeals perfected "on or after the date of enactment"). *See also* Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts, Pub. L. 94-426 § 1, 90 Stat. 1334 (1976) (applying rules governing habeas petitions brought under Section 2254 to claims filed on or after February 1, 1997).

Nor does fairness advance petitioner's claim. The States have benefitted *and* suffered from changes to federal habeas law. So have State-court prisoners. Just as many expansions of the writ have been applied to pending cases to the frustration of the States, so also many of the contractions of the writ have been applied to pending cases to the frustration of State prisoners. *Compare Brown v. Allen*, 344 U.S. 443; *Fay v. Noia*, 372 U.S. 391 *with Stone v. Powell*, 428 U.S. 465; *Wainwright v. Sykes*, 433 U.S. 72; *Sumner v. Mata*, 449 U.S. 539. Fairness, then, favors application of the Act to pending cases because it ensures that modifications to habeas law apply evenhandedly to States and State prisoners alike.

B. *LANDGRAF* CONFIRMS WHAT HISTORY TEACHES -- THE ACT APPLIES TO PENDING CASES.

Application of changes to federal habeas law to pending cases has not only been the norm throughout history, but it has also been consistent with this Court's retroactivity

case law.

A statute does not operate retroactively merely because it draws upon antecedent facts, applies to a case that arose before the statute was enacted, or reduces the chance of prevailing in a pending case. *Landgraf*, 114 S. Ct. at 1499; *Cox v. Hart*, 260 U.S. 427, 435 (1922). "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 114 S. Ct. at 1499. A statute has retroactive effect only if it "changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981). In the end, a statute may be said to change the legal consequences of completed acts only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 114 S. Ct. at 1505.

In announcing this test, *Landgraf* offered several safe harbors -- settings in which application of a new statute enacted during the pendency of an action would "unquestionably" be proper. *Id.* at 1501. Among them were the following: (1) "the intervening statute authorizes or affects the propriety of prospective relief"; (2) the statute confers or ousts jurisdiction; or (3) the statute constitutes merely a change in procedural rules. *Id.* at 1501-02. Each of these safe harbors applies here.

1. The Act Applies To Pending Cases Because It Merely Restricts The Federal Courts' Statutory Jurisdiction Over Habeas Claims.

"Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 433, 460 (1953). The authority to grant habeas relief to State prisoners thus is derived from and limited by 28 U.S.C. Section 2254.

The congressional power to invest federal courts with jurisdiction includes the power of "withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). "[T]he judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, 116 S. Ct. at 2340 (quoting *Lonchar v. Thomas*, 517 U.S. __, 116 S. Ct. 1293, 1298 (1996)). Congress may therefore enlarge or restrict the authorization to grant habeas relief to State prisoners by amending the relevant habeas statutes. Where Congress acts to restrict jurisdiction, the new law governs pending cases "because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf*, 114 S. Ct. at 1502 (quoting *Republic Nat. Bank of Miami*, 506 U.S. 80, 113 S. Ct. 554 (1992) at 565 (Thomas, J., concurring in part and concurring in judgment)). Courts therefore must apply intervening statutes conferring or ousting jurisdiction, "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 114 S. Ct. at 1501; *Bruner v. United States*, 343 U.S. 112, 116-17 (1952).

Quite simply, the amendments to 28 U.S.C. Section 2254 are jurisdictional in nature. They limit the jurisdiction of federal courts to grant habeas relief to State prisoners. With respect to claims adjudicated on the merits in State court, Section 2254(d) now provides that the writ "shall not be granted" unless the State court's decision was "contrary to," or "an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." This establishes an important limitation on a court's jurisdiction. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("clearly established law" must be sufficiently particularized to place a State court on notice that its ruling violates a constitutional right); *Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (same). Federal courts thus no longer have jurisdiction to issue the writ unless the petitioner's claims fall within the exceptions set forth in subdivisions (d)(1) and (d)(2). In short, federal courts have no power, save that conferred by 28 U.S.C. Section 2254, to grant habeas relief to State prisoners.

In similar fashion, the amendments to Section 2254(e) also restrict the federal courts' jurisdiction to grant habeas relief. In *Sumner v. Mata*, 449 U.S. 539, 547-48 n. 2 (1981), the Court found that the statutory presumption of correctness for State-court findings of fact, contained in former Section 2254(d), limited the exercise of federal habeas jurisdiction. By enacting Section 2254(e)(1), which eliminates the eight exceptions found in former Section 2254(d), and enacting Section 2254(e)(2), which restricts the federal court's authority to conduct evidentiary hearings unless the petitioner meets the statutory prerequisites, Congress has likewise restricted jurisdiction to review the factual determinations of State courts. Because Section 2254(e), like Section 2254(d), speaks only to the power of courts and not to the duties of individuals or governments, it properly applies to petitions pending on the date of

enactment.

2. The Act Applies To Pending Cases Because It Affects The Propriety Only Of Prospective Relief.

"When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf*, 114 S. Ct. at 1501. Case law has long regarded equitable or injunctive relief as prospective rather than retrospective in nature, even when it applies to conduct occurring before a statute's enactment. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 852 (1990); *Hall v. Beals*, 396 U.S. 45, 48 (1969). Injunctive relief by its nature "operates *in futuro*" and therefore is subject on appeal to intervening statutory changes even where relief already was obtained in district court. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921).

Habeas relief, like injunctive relief, is prospective in nature. A habeas petition attacks the fact or duration of a prisoner's confinement and seeks the injunctive (and equitable) remedy of an immediate release. *See Preiser v. Rodriquez*, 411 U.S. 475, 489 & 494 (1973). Both in its origin and in the nature of the remedy itself, the writ has always been deemed equitable in nature. *See Gomez v. U.S. Dist. Court for N.D. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam); *Withrow v. Williams*, 507 U.S. 680, 113 S. Ct. 1745, 1766-67 (1993) (Scalia, J., concurring in part and dissenting in part). Because 28 U.S.C. Section 2254 authorizes prospective injunctive relief, it remains entirely appropriate to apply the Act to pending cases. Much like the Clayton Act at issue in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), the Act here

represents a decision by Congress that a certain type of prospective relief ought not be granted in a defined class of cases. And, as in *American Steel Foundries*, that statutory command applies in any case where the decision granting prospective relief remains subject to review.

3. The Act Applies To Pending Cases Because It Affects Only Secondary Conduct.

The Act also applies to pending cases because it does not regulate primary behavior (*i.e.*, the underlying State criminal conduct), but only the secondary conduct of seeking collateral review of the State criminal judgment. *See Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("[t]he role of federal habeas proceedings . . . is secondary and limited"); *Lindh v. Murphy*, 96 F.3d 856, 864 (7th Cir. 1996) ("Section 2254(d) does not regulate primary conduct. Instead it makes the initial judgment more stable."). "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993). The writ of habeas corpus has historically been viewed as an extraordinary remedy reserved to afford relief for grievous wrongs. *Id.* at 1719. For these reasons, a federal habeas petitioner does not "ordinarily have any claim of reliance on past judicial precedent as a basis for his actions." *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 844 (1993).

Under these circumstances, applying the Act to pending cases would not cross the *Landgraf* line -- by "impair[ing] rights a party possessed when [they] acted," by "increas[ing] a party's liability for past conduct," or by "impos[ing] new duties with respect to transactions already completed." *Landgraf*, 114 S. Ct. at 1505. The amendments simply do not deprive habeas petitioners of any

protected right or interest, and the amendments do not impose any additional penalties or punishments. They do not change the rules defining or penalizing petitioner's crime. Nor can petitioner argue that he relied on the existence of federal *de novo* review of his State-court claims when he committed the crime. And petitioner has no plausible argument that he relied on the former habeas corpus statute in making tactical decisions during the State-court proceedings.

> No § 2254 applicant . . . could persuasively argue that during his trial or prior attacks on the judgment, he relied to his detriment upon the pre-amendment version of [§ 2254]. Release from a conviction or sentence is better sooner rather than later, and acquittal at trial is better yet. It is unlikely that any applicant . . . would pull any punches at trial or in early attacks on the judgment based upon expectations about the prospects of success in later proceedings.

Hunter v. United States, 101 F.3d 1565, 1573 (11th Cir. 1996). This last point is especially true in light of preexisting habeas law. Rules governing exhaustion of State remedies and procedural default not only encouraged petitioners to present all of their federal claims to the State courts, they generally required them to do so.

In the final analysis, the Act applies to all habeas corpus cases pending at the time of its enactment -- above all because the amendments "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 114 S. Ct. at 1502. But whether the question is framed in terms of procedure, jurisdiction, or primary versus secondary conduct, they all indicate that the Act applies to pending habeas corpus petitions.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully request the Court to affirm the decision below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the court of appeals correctly conclude that Congress, despite an explicit provision in Section 107(c) of the Antiterrorism and Effective Death Penalty Act, failed to specify the extent to which the statute's habeas corpus revisions are to apply retroactively to pending habeas cases, and, if so, did the court correctly interpret this Court's retroactivity jurisprudence to depend on proof of actual reliance interests and to create the presumption that habeas-curtailing statutes apply retroactively?

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IN THE

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For The Seventh Circuit

BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of this Court, the Washington Legal Foundation respectfully submits this brief amicus curiae in support of respondent. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C. WLF participates in litigation and administrative

proceedings affecting the broad public interest, and has a particular interest and expertise in criminal justice reform, the death penalty, and crime victims' rights. In that regard, WLF has appeared as amicus curiae in numerous cases before this Court. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987); *Payne v. Tennessee*, 501 U.S. 808 (1991); *Davis v. United States*, 114 S.Ct. 2350 (1994); *Felker v. Turpin*, 116 S.Ct. 2333 (1996).

WLF believes its perspective will complement the brief of respondent and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

Like *Felker v. Turpin*, 116 S.Ct. 2333 (1996), this case provides the Court with an opportunity to address issues arising under the federal habeas corpus reforms contained in the Antiterrorism and Effective Death Penalty Act of 1996. Also like *Felker*, the present case—even when limited by this Court's order granting *certiorari* to the single issue of retroactivity—may require the Court to consider and resolve fundamental questions about the purpose of the new statute, the model of federal habeas on which it is based, and the constitutional validity of some of the important changes it implements. *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 338-39 (7th ed. 1993) (discussing when "subsidiary question[s]" are "fairly included" in the question presented, within the meaning of SUP. CT. R. 14.1(a)). We will address these fundamental questions first, and then turn to the specific issue on which the Court has granted review in this case.

The new statute, and the model of federal habeas on which it is founded, are wholly consistent with the Constitution and with our society's continuing commitment to even-handed justice and procedural fairness in criminal proceedings. The federal statutory writ of habeas corpus for state prisoners, first authorized by

Congress in the Act of 1867, is largely a matter of legislative grace. Although the core of the statutory writ may have acquired limited constitutional status (under the Suspension Clause or the Due Process Clause) as a result of expansive modern conceptions of due process, the 1996 Act preserves the writ's ability to fulfill the statutory writ's two core purposes: protecting innocent persons and deterring egregious or bad-faith misconduct by state courts. The 1996 Act thus comports with the Constitution and can be constitutionally applied to all habeas cases—including pending ones—if that is the result reached under the retroactivity analysis laid out by this Court in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994).

The *Landgraf* analysis requires that we look first to expressed Congressional intent and then to certain canons of statutory construction, in deciding whether or not a new statute should be applied to conduct that preceded the statute's enactment. Because Congress did not speak clearly on the question of whether the challenged portion of the 1996 Act, amending 28 U.S.C. § 2254(d), applies to pending habeas cases, the Court must proceed to the second part of the *Landgraf* analysis to determine whether such application would be genuinely "retroactive" in effect (and hence presumptively improper) or not (and hence presumptively allowed). The challenged portion of the 1996 Act does not impair any "vested rights" held by state prisoners like Lindh prior to the Act's effective date of April 24, 1996, but merely serves to reallocate decision-making authority in the enforcement of those rights between the state and the lower federal courts, much like a jurisdictional statute in a unitary court system might do. The application of amended 28 U.S.C. § 2254(d) to state prisoners whose criminal convictions became final prior to the Act's effective date—and even to those who, like Lindh, filed their federal habeas petitions before that date—thus should not be seen as "retroactive" in effect. Rather, under this Court's analysis in *Landgraf*, such application flows naturally from the premise that a court should "apply the law in

effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *See Landgraf*, 114 S.Ct., at 1486 (citing *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974)).

Finally, we express no view on the question whether, if the Court concludes that the challenged statutory provision generally applies to most pending habeas cases, the Court should examine possible reliance interests of persons similarly situated to Lindh, in order to determine whether he may belong to a narrow category of habeas petitioners that should be exempted on fact-specific grounds from the general rule of statutory applicability.

ARGUMENT

I. THE AVAILABILITY OF FEDERAL HABEAS CORPUS AS A REMEDY FOR CONSTITUTIONAL VIOLATIONS IN A STATE CRIMINAL CASE IS LARGELY A MATTER OF LEGISLATIVE GRACE, AND CONGRESS MAY REDUCE THE SCOPE OF FEDERAL HABEAS WITHOUT RUNNING AFOUL OF THE CONSTITUTION.

This case involves only one legal issue—whether a single provision of the Antiterrorism And Effective Death Penalty Act of 1996, amending 28 U.S.C. § 2254(d), applies to pending federal habeas corpus petitions. Much of the rhetoric surrounding this issue, however, can be traced to the view of some that federal habeas itself has become a "vested right" of state prisoners. We therefore begin by addressing that view.

Although events of the past three-and-a-half decades have perhaps misled us into believing otherwise, state prisoners incarcerated under judgments of criminal conviction enjoy no constitutionally-based right to plenary review of their federal

constitutional claims in a federal forum. Instead, state prisoners historically have enjoyed— and continue to enjoy today— (1) the right, unchanged by the 1996 Act, to petition this Court for a writ of *certiorari* to review the judgment of the state courts on direct appeal, *see Felker v. Turpin*, 116 S.Ct. 2333 (1996), and (2) a limited opportunity, first conferred upon state prisoners by Congress in the Habeas Corpus Act of 1867 and later subjected to numerous legislative and judicial modifications, to seek issuance of a statutory writ of federal habeas corpus. Closer examination of the evolution of federal habeas for state prisoners reveals the extent to which Congress remains free to reduce the scope of the statutory remedy.

A. Federal Habeas Corpus Was Unavailable to Most State Prisoners Until the Habeas Corpus Act of 1867, and Modern Changes in the Scope of the Statutory Writ Have Occurred With the Expressed Intent or the Subsequent Tacit Consent of Congress.

The Great Writ of the Magna Carta and the English common law, which serves as a bastion against executive detention without judicial process, is numbered among our most cherished legal rights and enjoys the full protection of the Constitution. *See* U.S. CONST., Art. I, § 9, Cl. 2 (Suspension Clause). The same cannot be said of the statutory version of the writ that is the subject of the instant case. As the Court noted just last year in *Felker*, until 1867, federal habeas was largely unavailable as a remedy for state prisoners alleging constitutional violations in their state criminal cases. The Judiciary Act of 1789, which authorized federal courts to issue "writs of . . . habeas corpus," specifically prohibited use of the writ to inquire into the incarceration of "prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In fact, until 1867, a federal court could issue a writ of habeas corpus to produce a

state prisoner only if the prisoner (1) was needed to testify in federal court; (2) was imprisoned by the state for an act done in pursuance of a federal law; or (3) was a "subjec[t] or citize[n] of a foreign State, and domiciled therein." *See Felker*, 116 S.Ct., at 2338 (citing Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82; Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634-635; and Act of Aug. 29, 1842, ch. 257, 5 Stat. 539-540).

Long after Congress enacted the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, making federal habeas available for the first time to most state prisoners, the statutory writ—like its common-law ancestor—was still largely limited to rare cases involving jurisdictional defects in the state courts or egregious violations of due process that came to be viewed as the functional equivalent of a jurisdictional defect. *See, e.g., Waley v. Johnson*, 316 U.S. 101 (1942); *Frank v. Mangum*, 237 U.S. 309 (1915); *see generally* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966), describing the common-law writ ("[O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court.").

During the 1950s and 1960s, for reasons similar to those that originally led Congress to enact the Act of 1867, this Court took a leading role in redefining and expanding the scope of the federal habeas remedy for state prisoners. This expansion of federal habeas was necessary because, at the same time, the Court was engaged in the controversial process of developing important new federal constitutional rights in the area of criminal procedure. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966). These developments, like some of the legislation enacted by the Reconstruction Congress, provoked hostility and resistance in at

least some state courts, who viewed these new constitutional rules as if they were "invasions" by a "foreign enemy." *See generally* Joseph L. Hoffmann and William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 77-80 (1994). Federal habeas thus served as a crucial weapon in a short-lived battle for supremacy between this Court's new constitutional criminal procedure doctrines and pre-existing bodies of state criminal procedure law—a battle that ended more than a decade ago with the nearly complete displacement of state criminal procedure law by federal constitutional rules of criminal procedure. *See id.* at 80-85.

Importantly, however, even as this Court has acknowledged its own "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged," *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977), the primacy of Congress in defining the proper scope of the statutory writ has always remained clear. So, for example, shortly after the famous 1963 trilogy of Supreme Court habeas decisions, *see Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963), Congress enacted amendments to the habeas statute that were designed to codify in large part, while modifying in certain respects, the new habeas rules announced by the Court in those cases. *See* Act of Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105. Although there has been some disagreement over the meaning of these amendments, *compare, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (O'Connor, J., dissenting), *with Wainwright v. Sykes*, 433 U.S. 72, 99, 106 n.7 (1977) (Brennan, J., dissenting), no Member of this Court has ever disputed Congress's authority—subject only to limited constitutional restrictions—either to ratify or to reject the Court's evolving interpretations of the federal habeas statute.

The Antiterrorism and Effective Death Penalty Act of 1996 represents the first major attempt by Congress in more than a

hundred years to reassert its control over the development of the statutory habeas writ. Congress surely possesses the authority to do so, as long as that authority is exercised within constitutional boundaries. In the next section, we address the constitutional limits on Congress's ability to alter the scope of the federal habeas remedy for state prisoners.

B. Although the Statutory Writ's Vital Role in Fulfilling its Two Core Purposes—Protecting Innocent Persons and Deterring Egregious or Bad-Faith Misconduct by State Courts—May Have Acquired a Measure of Constitutional Protection As a Result of Expansive Modern Conceptions of Due Process, Congress is Otherwise Free to Reduce the Availability of the Federal Habeas Remedy.

What are those "limited constitutional restrictions" that might prevent Congress from restricting or entirely eliminating the federal habeas remedy for state prisoners? As we argued in our Brief Amici Curiae in *Felker v. Turpin*, No. 95-8836, an historical view of the Suspension Clause, U.S. CONST., Art. I, § 9, Cl. 2, would suggest that the Clause has no application whatsoever to the statutory writ (which did not even come into existence until 1867). *See, e.g.*, Richard H. Fallon and Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 n.244 (1991); Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 170 (1978) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did.").

Even if the Court chooses to reject such a historical view, however, the Constitution cannot plausibly be held to protect the entire extent of the statutory writ as it has existed in the modern era. Such an extreme holding would ignore the historically

contingent nature of the Court's modern habeas expansion, which (as noted above) was motivated largely by the need—no longer apparent—to use the statutory writ to ensure that state courts recognized and respected the supremacy of federal constitutional law. Such a holding would also call into serious question many of this Court's recent precedents that have whittled away at the scope of the federal habeas remedy. *See, e.g., Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993); *McCleskey v. Zant*, 499 U.S. 467 (1991).

Given our modern expansive conception of due process, the statutory writ has acquired a limited measure of constitutional protection (either by the Suspension Clause or by the Due Process Clause)—but that protection extends only as far as necessary to preserve the writ's vital role in fulfilling two core purposes that lie at the heart of our criminal justice system: (1) protecting innocent persons from unjust incarceration, and (2) deterring egregious or bad-faith misconduct by state courts in the enforcement of constitutional rights.

The first of these core purposes, the protection of the innocent, has long been recognized as a primary goal of habeas law, although it has only rarely been the driving force behind the Court's habeas decisions. *See, e.g., Herrera v. Collins*, 113 S.Ct. 853 (1993) (recognizing, at least in theory, a habeas petitioner's right to relief based on actual innocence, even in the absence of a constitutional claim of procedural trial error); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) (establishing the "fundamental miscarriage of justice" exception to procedural default doctrine restricting habeas review); *Stone v. Powell*, 428 U.S. 465 (1976) (restricting habeas review of Fourth Amendment claims, which rarely implicate a petitioner's innocence); Friendly, *supra*, at 142.

The second core purpose, the deterrence of egregious or bad-faith misconduct by state courts in enforcing constitutional rights,

is no less important, *see, e.g., Mackey v. United States*, 401 U.S. 667, 675, 687 (1971) (Harlan, J., dissenting and concurring in the judgment) ("primary justification" of habeas is to provide an incentive for state courts to "toe the constitutional mark"), but can be accomplished in full measure through the adoption of a "reasonableness" standard of review for all federal habeas claims. *See* Hoffmann and Stuntz, *supra*, at 88-91. Such a "reasonableness" standard of review can reach, and thereby deter, all cases of egregious or bad-faith constitutional violations by state courts without extending the costly habeas remedy to other cases in which the state courts acted in good-faith reasonable reliance on federal law and in which there is thus no state-court "misconduct" to deter. *Cf. Teague v. Lane*, 489 U.S. 288 (1989) (accomplishing similar result through the definition of "new law" for purposes of retroactivity analysis in habeas cases).

As we noted in our brief in *Felker*, the 1996 Act is completely consistent with a new model of federal habeas for state prisoners that seeks to restrict the habeas remedy to those rare situations where issuance of the writ is necessary to achieve one of the aforementioned goals. For example, amended 28 U.S.C. § 2254(d), the subject of the instant case, limits habeas relief to cases involving "a sufficiently high degree of conflict between the state decision and 'clearly established' federal law as determined by this Court—precisely the kinds of cases in which state courts need to receive a deterrence message." Brief Amici Curiae of Washington Legal Foundation and Justice for Surviving Victims, Inc., in Support of Respondent in *Felker v. Turpin*, No. 95-8836, at 22. Similarly, in amended 28 U.S.C. §§ 2254(e) and (f), the 1996 Act provides adequate opportunities for potentially innocent prisoners to obtain federal review of their constitutional claims, thus ensuring against fundamentally unjust incarcerations.

In these and other ways, the 1996 Act fulfills the twin goals of protecting innocent persons and deterring egregious or bad-faith misconduct by state courts. The 1996 Act therefore comports

with the Constitution, even in light of our modern expansive conceptions of due process, and honors society's continuing commitment to even-handed justice and procedural fairness in criminal proceedings.

II. UNDER THIS COURT'S TWO-PART *LANDGRAF* ANALYSIS, AMENDED 28 U.S.C. § 2254(d) SHOULD BE APPLIED TO PENDING HABEAS CASES; ALTHOUGH CONGRESS EXPRESSED NO CLEAR INTENT ON THE SUBJECT, THE NEW STATUTE MOST CLOSELY RESEMBLES A JURISDICTIONAL STATUTE, AND THUS ITS APPLICATION WOULD NOT CREATE A GENUINELY "RETROACTIVE" EFFECT.

A. Congress Did Not Clearly Express Its Intent Concerning the Application of Amended 28 U.S.C. § 2254(d) To Pending Habeas Cases.

Under the two-part retroactivity analysis laid out by the Court in *Landgraf v. USI Products*, 114 S.Ct. 1483 (1994), the first question that must be asked is if Congress has expressed, clearly and unambiguously, its intent as to whether or not the relevant section of the 1996 Act should apply to pending habeas cases. The answer to this question is "no."

The habeas reforms contained in the Antiterrorism and Effective Death Penalty Act of 1996 are divided into two separate sets of statutory provisions. The first set, contained in Sections 101 through 106 of the Act, applies to all federal habeas cases (and, with minor changes, to all collateral review of federal criminal cases under 28 U.S.C. § 2255). This is the portion of the statute that contains the specific provision challenged in the instant case, namely, the amendments to 28 U.S.C. § 2254(d).

The second set of statutory provisions, contained in Section 107 of the Act, applies only to state death-penalty cases, and then

only after the relevant state has adopted certain new procedures with respect to the appointment of competent counsel for death-row inmates in state post-conviction proceedings. After these conditions are satisfied, all death-penalty habeas cases in the relevant state are governed by the special rules of Section 107, which largely supplant the rules otherwise applicable to habeas cases.

In Section 107(c), Congress expressed its intent with respect to the application of the special Section 107 rules to pending death-penalty habeas cases: these special rules "shall apply to cases pending on or after the date of enactment of this Act." 110 Stat. 1214, 1226. Congress expressed no such view, however, about the application of the general habeas reforms contained elsewhere in the 1996 Act to pending habeas cases.

What can be made of the fact that Congress expressed an intent to have Section 107 apply to pending death-penalty habeas cases, but expressed no intent as to whether the general reforms contained in Sections 101-106 should apply to pending habeas cases? Frankly, not much. This difference between the two parts of the statute is far too thin a reed to support Lindh's attempt to find Congressional intent by negative implication, especially given that there are reasonable competing explanations of Congress's decision to treat the two parts of the statute differently.

The most obvious explanation is that—unlike the general habeas reforms contained in Sections 101-106, which were capable of becoming effective as soon as the Act was enacted—the special Section 107 rules could not possibly become effective until sometime after the enactment date of the Act, because the states were first required to adopt certain new procedures in order to avail themselves of Section 107's special rules. Thus, with respect to Section 107, it was inevitable that someday the following questions would arise under Section 107: Once a particular state has finally complied with the new

procedures, and hence qualifies for Section 107 treatment, do the special Section 107 rules apply to all death-penalty habeas cases then pending, or only to those new cases filed after the state first qualifies for Section 107 treatment? And, if Section 107 applies to pending cases, does it apply to all such cases or only to those filed after the effective date of the 1996 Act? These retroactivity questions are much more difficult than most because they involve the added complication of delayed implementation of previously enacted statutory changes. Hence, Congress may well have chosen to express its intent concerning the application of the Section 107 amendments because it realized that those amendments would pose a special kind of retroactivity problem.

Seen in this light, Congress's expressed intent concerning Section 107 may well indicate that Congress had the *same* intent, not the opposite, with respect to the general habeas reforms in the Act. In any event, however, the fact that Section 107 poses such a special kind of retroactivity problem would seem to defeat any attempt to draw from it any negative implication concerning Sections 101-106.

A second plausible explanation for Congress's expression of intent in Section 107 is that those amendments implement a series of automatic stays of execution that Congress might have wished to make effective as quickly as possible, and in as many death-penalty habeas cases as possible (including all pending cases, as well as all newly filed ones), after a particular state finally adopts the required new procedures and qualifies for Section 107 treatment. The amendments contained in Sections 101-106 have no similar, automatic life-or-death consequences.

Finally, it is certainly plausible that Congress simply overlooked or ignored the chance to express its intent with respect to Sections 101-106. As acknowledged by Lindh, the substantive provisions in Section 107 originated in a different House of Congress, at a different time, than did the provisions contained in

Sections 101-106. *See* Brief of Petitioner, at 31 n.24. Moreover, the two parts of the statute are aimed at quite different goals—the Section 101-106 amendments apply to all habeas cases, and implement changes that almost uniformly restrict the scope of federal habeas, whereas the Section 107 amendments are designed specifically to deal with death-penalty cases and incorporate a significant amount of *quid pro quo* balancing of the respective interests of the state and the death-row inmate. In this complicated statutory context, it is not at all surprising that Congress dealt expressly with retroactivity in one part of the statute and not in the other part, and we should not strain to draw unjustifiable conclusions from the difference.

Nor should we draw similarly unjustifiable conclusions from another provision in Section 107 relied upon by Lindh: the new 28 U.S.C. § 2264(b), which incorporates subsections (a), (d), and (e) of Section 2254, and makes them applicable to Section 107 capital habeas cases. According to Lindh, the only possible reason for such a reference is that Congress sought to make those three subsections apply retroactively to pending capital habeas cases, suggesting to Lindh (by way of negative implication) that those three subsections (along with the remainder of Sections 101-106) must not apply on their own terms to all pending cases.

In his struggle to draw some sustenance from Section 107, however, Lindh glosses over a much more obvious interpretation of the reference to Section 2254(a), (d), and (e) in the new Section 2264(b)—namely, that the three subsections cited are the only ones in Section 2254 that apply to capital habeas cases otherwise governed by the special Section 107 rules. This is the most plausible reading of Section 2264(b) and does no violence either to the structure of federal habeas or to the interests of the states.

Lindh notes that such a reading would eliminate the exhaustion requirement in Section 107 cases and claims that this result could

not be what Congress intended. But, it must be remembered that Section 107 applies only to capital habeas cases. In capital cases, exhaustion (which is one of the Section 2254 provisions that is not referenced in the new Section 2264(b)) generally works to the advantage of the habeas petitioner, who seeks delay above all else, and to the disadvantage of the State. This is one reason many states sought to have this Court, in *Granberry v. Greer*, 481 U.S. 129 (1987), recognize a state's right to waive the habeas exhaustion requirement, and it is surely one reason that Section 107 does not require exhaustion in capital habeas cases.

Indeed, in the overwhelming majority of capital habeas cases that will someday be governed by the special Section 107 rules (leaving to one side those exceedingly rare cases of newly discovered evidence offered by Lindh as his best evidence of an illogic in the lower court's construction of the new statute), the only provisions in Section 2254 that a State would ever likely seek to assert are the same three provisions that are referenced in the new Section 2264(b): subsections (a), (d), and (e). It seems probable that Congress incorporated these three subsections because they are the only subsections meant to apply to Section 107 capital cases. There is no basis for concluding that the reference to those provisions has anything to do with retroactivity.

B. The 1996 Amendments to Section 2254(d), Which Create a New Standard of Review for Federal Habeas Cases Filed by State Prisoners, Do Not Impair Any "Vested Rights" But Merely Reallocate Decision-making Authority to Enforce Those Rights Between The State And The Lower Federal Courts, and Thus Their Application to Pending Habeas Cases Would Not Create a Genuinely "Retroactive" Effect.

Because Congress did not clearly and unambiguously express its intent concerning the application of amended 28 U.S.C. § 2254(d) to pending habeas cases, the analysis under *Landgraf*

must proceed to the question of whether such application would be genuinely "retroactive" in effect (and hence presumptively improper) or not (and hence presumptively permitted). This final step in the *Landgraf* analysis depends, in turn, on whether the challenged new statutory provision "attaches new legal consequences to events completed before its enactment." *Landgraf*, 114 S.Ct., at 1499. According to this Court,

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, *see Republic Nat'l Bank v. United States*, 506 U.S. 80 (1992) (Thomas, J., concurring in part and concurring in the judgment), or upsets expectations based in prior law. . . . The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," *see Danforth v. Groton Water Co.*, 59 N.E. 1033, 1034 (1901) (Holmes, J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf, 114 S.Ct., at 1499.

Although the *Landgraf* case cited and extensively discussed dozens of prior retroactivity decisions, we believe that the instant case presents the Court with a situation unlike any other it has previously encountered in the context of retroactivity law. On the one hand, this case resembles some prior cases in which a cause of action based on past conduct was newly created, extinguished, or significantly modified by a new statute. Such cases generally result in prospective-only application, on the

ground that applying such a new statute to past conduct would unfairly create a "new disability," *see Landgraf*, 114 S.Ct., at 1507, and would "impose new burdens on persons after the fact," *see id.* at 1500; *see also*, cases cited in *Landgraf*, 114 S.Ct., at 1500 n.25, and at 1507 n.36. On the other hand, this case also resembles some prior cases involving new procedural rules. *See, e.g.*, cases cited in *Landgraf*, 114 S.Ct., at 1502 n.28. Such situations generally result in the application of the new rule to pending cases, on the ground that parties to a pending case have "diminished reliance interests" in procedural rules. *See id.*, 114 S.Ct., at 1502. Moreover, the present case resembles prior cases involving changes in the availability of prospective relief, *see, e.g.*, cases cited in *Landgraf*, 114 S.Ct., at 1501, and are, likewise, generally applied to pending cases on the ground that parties have no "vested rights" to prospective relief. *See Landgraf*, 114 S.Ct., at 1501.

We believe that, despite these similarities, the instant case is *sui generis*, and does not fit squarely into any of the categories identified by the Court in prior retroactivity cases. For example, the "cause of action" cases so heavily relied upon by Lindh are inapposite because—although amended 28 U.S.C. § 2254(d) substantially alters the federal habeas "cause of action"—it leaves wholly untouched an equivalent "cause of action" in the state courts, namely, the direct appeal (along with the accompanying right to seek *certiorari* review of the state-court judgment in this Court). Although Lindh argues strenuously that the prior federal habeas "cause of action" was "qualitatively superior, in virtually every case," to other available remedies for constitutional violations, *see* Brief of Petitioner, at 17 & 19, such a claim seems either hyperbolic or hopelessly archaic in light of such cases as *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Coleman v. Thompson*, 111 S.Ct. 2546 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991); and, especially, *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny—each of which served to align federal habeas law more closely with the procedural rules applicable in the analogous

state-court criminal proceedings. Indeed, the state-court version of the same "cause of action" modified by amended 28 U.S.C. § 2254(d) is, in some important respects, even more favorable to a state prisoner than was the previous federal habeas "cause of action." *See, e.g., Stone v. Powell*, 428 U.S. 465 (1976). On balance, it appears that Lindh's strong preference for the previous federal habeas "cause of action" may be based on the outdated belief that there must be a constitutionally-based "right" to a "federal forum" for all federal constitutional claims, beyond the obvious (and unaltered) right to seek *certiorari* from this Court. *See* Hoffmann and Stuntz, *supra*, at 81 & n.50.

What makes the instant case truly unique, among the myriad retroactivity cases previously decided by the Court, is that the new statutory provision challenged here—without making any changes at all in the federal constitutional rules of criminal procedure that form the substantive basis for both state-court and federal habeas "causes of action"—serves to reallocate decision-making authority in the enforcement of those rights between the state and lower federal courts, much like a jurisdictional statute might operate in a unitary court system. The clear purpose of the amendments to 28 U.S.C. § 2254(d) is to place more responsibility in the hands of the state courts, in adjudicating claims of constitutional violations in state criminal cases, by requiring federal habeas courts to forego the remedy of issuing writs of habeas unless the new "reasonableness" standard of review of Section 2254(d) can be met. This change in federal habeas law does not, in any way, vitiate a habeas petitioner's constitutional rights. Nor does it, in any way, make it less likely that a state prisoner will obtain a remedy for a constitutional violation from the state courts, or from this Court on writ of *certiorari*. If anything, we might reasonably expect (as Congress certainly seems to expect) that this change in federal habeas law, by placing greater trust in the state courts, will make it even more likely that those state courts will vigorously protect the constitutional rights of their citizens.

For these reasons, although we agree with Lindh that amended 28 U.S.C. § 2254(d) is non-jurisdictional in nature, for purposes of completing *Landgraf*'s retroactivity analysis, the new statute should be treated as if it were a jurisdictional statute. That is, it should generally be applied to pending habeas cases. Like a jurisdictional statute, the statute challenged here "takes away no substantive right but simply changes the tribunal that is to hear the case." *Landgraf*, 114 S.Ct., at 1502 (citing *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). In the words of this Court, "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 114 S.Ct., at 1502 (citing *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80 (Thomas, J., concurring)). Such an outcome would also flow naturally from the premise, reiterated in *Landgraf*, that a court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *See Landgraf*, 114 S.Ct., at 1486 (citing *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974)).

The only remaining issue is whether, because amended 28 U.S.C. § 2254(d) is not, in fact, a jurisdictional statute, the Court should continue to inquire into any possible "reliance interests," *see Landgraf*, 114 S.Ct., at 1502, as a means of assessing the potential unfairness to some litigants of applying amended 28 U.S.C. § 2254(d) to all pending habeas cases, including those (like Lindh's) in which the habeas petition was filed before the new statute's effective date. In other words, should the Court consider exempting certain narrow categories of habeas petitioners who were most likely to have acted in reasonable reliance on the prior allocation of respective state- and federal-court responsibility for enforcing federal constitutional rights, from the otherwise general application of the new statutory provision to pending habeas cases? Such a fact-sensitive approach is well within the Court's sound discretion in

interpreting and applying *Landgraf*'s retroactivity analysis. Given the *sui generis* nature of the retroactivity controversy posed by the instant case, and the limited number of persons likely to be similarly situated to Lindh, we express no view about the question of whether Lindh would satisfy the requirements of demonstrating such a "reliance interest."

CONCLUSION

For the reasons stated herein, as well as those set forth in the Brief for Respondent, the Court should affirm the judgment of the Seventh Circuit. However, even if the Court chooses to exempt Lindh from the application of the challenged statutory provision based on fact-specific "reliance interests," it should find that amended 28 U.S.C. § 2254(d) is generally applicable to pending habeas cases.

Respectfully submitted,

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